GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

UNFOLDMENT, INC.	)	
	)	CAB No. D-1062
Under Contract No. 7KGC09	)	

For the Appellant, Unfoldment, Inc.: Kemi Morton Reed, Esq. and Brian Lederer, Esq. For the District: Andrew J. Saindon and Jennifer L. Longmeyer, Assistants Corporation Counsel, DC. Order by Chief Administrative Judge Lorilyn Simkins with Administrative Judge Matthew S. Watson concurring.

ORDER ON MOTION TO DISMISS/ SUMMARY JUDGMENT

Appellant, Unfoldment, Inc., has filed an amended complaint alleging that its multiyear contract with the District of Columbia Child and Family Services Agency ("CFSA" or "Agency") was improperly terminated. Unfoldment requests award for: outstanding invoices for services during the contract period from July 1, 1997 to November 4, 1998; adjusted invoices; Quick Payment Act interest on late payments and simple interest; costs associated with closing the program from October 28, 1998 to December 28, 1998; unexpired lease payments and associated costs; unexpired vehicle lease payments and insurance costs; repairs caused by damages by CFSA clients, window and door replacement costs ordered by contract monitors; furniture and equipment purchased for the program; and attorneys' fees. The District has moved to dismiss the appeal or in the alternative for summary judgment asserting that there is no cognizable claim upon which relief can be granted based upon the undisputed facts set forth in this appeal, and that there are no genuine issues of material facts in dispute. W dismiss or deny all claims, except for Unfoldment's claim for unpaid invoices and QPA and simple interest.

Background

On July 1, 1997, Unfoldment entered into a one-year, fixed-price, indefinite quantity contract with four one-year options with CFSA to provide Group Home Continuing Foster Care Services to adolescent wards of the District. Unfoldment characterizes this contract as a multi-year contract. The services were to include "board and care, clothing, education, vocational training and guidance to help them reach their maximum potential." (Contract, p.1). The Contract established a maximum contract ceiling amount of $1,728,896.00 and a maximum number of thirty (30) children who could reside in Unfoldment's group homes at any one time. The placement of a minimum number of children was not set forth in the Contract. The per diem rate for each child was set at $157.89. The Contract provides that payment was to be made only for the documented number of children who were in the facility. (Contract, Article XIV).

The first year contract term ended on June 30, 1998, at which time the Agency exercised a partial option extending the contract term through September 30, 1998. On or about September 30,

1998, the Agency extended the Contract by one month, until October 31, 1998. The General Receiver notified Unfoldment in a letter, dated October 28, 1998, that its services would no longer be required, "effective 60 days from the date of this letter." This letter exercised one final option of two additional months until December 28, 1998.

On December 4, 1998, Unfoldment filed an appeal with the Board, setting forth dozens of allegations in a 28-page Complaint. For almost three years after the filing of the initial appeal, no activity took place at the Board while Unfoldment and CFSA pursued settlement discussions. Sometime in October 2000, CFSA, which was operated under a Receivership at the time,[1] paid Unfoldment $236,925.58 as a "partial settlement" of its claim. (Amended Complain, ¶ 10, and Exh.14). A letter from Milton Grady, then-Deputy Receiver of Operations for CFSA, memorializes the payment and describes it as costs associated with the **termination** of Unfoldment's contract. (Emphasis added). Mr. Grady mentions in his letter that he was unable to substantiate all of the claimed costs, that his review included consideration of information forwarded to him on September 27, 2000, and that this payment represented only a partial settlement for the costs which had been substantiated. According to the letter, the $236,925.58 represented payment for proposal preparation costs of $12,000, facility lease termination costs of $23,000, and $201,825.58 for outstanding invoices. Although Mr. Grady's letter invited Unfoldment to present evidence of other costs, no further payments were made and according to both parties further negotiations were unsuccessful.

On October 18, 2001, Unfoldment filed an amended complaint. The 26-page, 107-paragraph Amended Complaint reorganizes Appellant's claims somewhat, but still includes counts which are not cognizable by this Board, and a great deal of material that is irrelevant.

On November 3, 2001, the District filed a motion to dismiss or in the alternative a motion for summary judgment. On December 21, 2001, Appellant filed its opposition to the District's motion. Appellee replied on January 18, 2002. Appellant filed an opposition to the District's reply on February 1, 2002.

Motion to Dismiss / Motion for Summary Judgment

The District has filed a two-pronged motion to which two different, but related, standards apply. In reviewing a motion to dismiss a complaint, the Board looks at only the complaint to test its legal sufficiency. For purposes of reviewing a motion to dismiss, all facts in the complaint are admitted, and we construe all facts and inferences in favor of the appellant. Super Ct. Civ. R. 12(b)(6); *American Ins. Co. v. Smith*, 472 A. 2d 872, 874 (D.C. 1984).

In order to be entitled to summary judgment, the moving party has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56(c); *Clyburn v. 1411 K Street Limited Partnership,* 628 A. 2d. 1015, 1017 (D.C.

[1]On October 1, 2001, the Receivership ended and authority for the Agency returned to the District government.

1993). The record is viewed in the light most favorable to the party opposing the motion. *Colbert v. Georgetown University*, 641 A. 2d 469, 472 (D.C. 1994) (en banc). Once the moving party makes the requisite showing, it becomes incumbent upon the non-moving party to demonstrate that a genuine disputed factual issue exists. *Smith v. Union Labor Life Ins. Co.*, 620 A.2d 265, 267 (D.C. 1993). The party opposing summary judgment must then make an evidentiary showing, via affidavit or otherwise, to demonstrate the existence of a genuine issue for trial. The non-moving party must present definite, competent evidence to rebut the motion. *Raskauskas v. Temple Realty Co.*, 589 A.2d 17, 25 (D.C. 1991). It is not appropriate at this stage of the proceedings to resolve issues of fact, weigh evidence or make credibility determinations. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 255 (1986).

A. Multi-Year Contract

Before we analyze Unfoldment's claim count-by-count, it's important to clarify the nature of the contract. Unfoldment maintains that it entered into a multi-year contract with CFSA, and implies that CFSA was required to exercise options.

First, Unfoldment claims that the RFP described the contract as a five-year, multi-year contract, and that it must have been a multi-year contract because the Agency required Unfoldment to submit cost and pricing data covering a five year period . (Amended Complaint, p.5). We are unable to confirm Appellant's allegation regarding the RFP since Unfoldment failed to attach a copy of the RFP as an exhibit to its pleadings. Furthermore, the Agency's request for the submission of five years of cost and pricing data was appropriately requested for a one year contract with four one year options. Unfoldment also argues that this is a multi-year contract because the Article XIX is entitled Multi-Year Contract Cancellations. Notwithstanding the title of the cancellation clause, the substance of the clause does not comply with essentials of a multi-year cancellation clause. Article XIX provides that if the Control Board disapproved the contract or if Congress failed to appropriate funds, the Contractor would only be paid for work or services actually performed until the contract was cancelled. On the other hand, Title 27 DCMR § 2001.1requires that:

> Each multiyear contract shall provide that if the contract is canceled due to unavailability of funds, the contractor shall be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies delivered or services performed under the contract.

This Contract is described as a one year, "Indefinite Quantity Contract with Fixed Unit Pricing."(Contract, Articles XIV and XVI). These clauses, as well as, the lack of any cancellation ceiling, the absence of language regarding the reimbursement for nonrecurring costs, and the statement in Article XIV § C that there are no cost reimbursable items of any kind in the contract, leads one to conclude unequivocally that this was not a multi-year contract.

B. Expiration of Option or Termination

Unfoldment disputes CFSA's unilateral right to let the Contract expire without exercising the option. Based on the contract language, CFSA had no limitations on its right to let the Contract expire. Article XVI , described as the Contract Period provides:

> 1. The term of this contract shall be from July 1 1997, through June 30, 1998.
>
> 2. The duration of the contract shall be for a period of one year from the date of the contract start. The Child and Family Services Agency may extend the duration of the contract for a period of one year or any portion thereof by written notice to the Contractor before expiration of the contract. The exercise of an option is subject to the availability of funds at the time of the exercise of the option and the approval of the District of Columbia Financial Responsibility and Management Assistance Authority (the Control Board).
>
> 3. The total duration of the contract, including the exercise of any option(s), shall not exceed five (5) years.

The language is clear. The term of the Contract was for one year subject to the District's option. The language is permissive; renewal is uncertain. The Contract placed no limitation on the government's freedom to decline the exercise of its option.

The Contract language which restricts the exercise of an option to the availability of funds does not compel the government to exercise the option in the event that funds are available. This clause is inserted into contracts to comply with the federal Anti-Deficiency clause (31 U.S.C. § 1341) and "does not limit the government's freedom to choose not to exercise the option even if funds were available." *Tri-Continental Industries, Inc.* CAB No. P-297, 39 D.C. Reg 4456 (Mar. 6, 1992); *Government Systems Advisors, Inc. v. U.S.*, 847 F. 811 (Fed. Cir. 1988).

The Board is also called to decide whether as a matter of law the Contract expired on its own terms, or whether the Contract was terminated. The record includes a letter from the then-Receiver, Ernestine Jones, dated October 28, 1998, notifying Unfoldment that the Agency would not exercise another option, after a two-month, close-out period. It is not material to this issue that Ms. Jones letter states that Unfoldment's services did not meet the needs of the children or mentioned non-compliance with the District's tax laws. Even if she were mistaken in these matters, the Agency still had the right not to renew.

Appellant directs the Board's attention to another Agency letter as providing contradictory evidence to the expiration of the Contract option. Appellant claims that the letter proves that the District terminated the Contract for default. The undated letter from Milton Grady, the then-Deputy

Receiver for Operations, characterizes the settlement payments made to Unfoldment as arising out of a termination of Unfoldment's Contract. He states: "This letter is to advise you of recent developments pertaining to the review of the costs associated with the termination of Unfoldment's contract. (Contract # 7KGC0). This review included consideration of the information forwarded to my attention on September 27, 2000." Mr. Grady's use of the words "termination of Unfoldment's contract" does not expand or create legal rights for Unfoldment, beyond those that existed on December 28, 1998, when the last option expired. Mr. Grady's letter does not use the words " termination for convenience" or "default termination," terms of art in government contracts, but simply the word "termination" which in standard speech simply means "conclusion." (*Webster's Ninth New Collegiate Dictionary, 1985 ed.).*

More significantly, however, Mr. Grady's letter cannot be used as evidence to prove the merits of the underlying dispute, because it evidences a settlement agreement. The District law is consistent with Rule 408 of the Federal Rules of Evidence, which does not permit the use of offers of compromise or settlement agreements to prove liability for a claim or its amount. *See* S. Graae & B. Fitzpatrick, *The Law of Evidence in the District of Columbia, Rule 408* (1995 Repl.); *Pyne v. Jamaica Nutrition Holding Ltd.* 497 A. 2d 1118 (D.C. 1985). Mr. Grady's undated letter cannot be used as evidence to prove that Unfoldment's contract was terminated for cause or convenience.

C. Specific Counts in the Amended Complaint.

Count One -- Mitigation of Damages

Appellant argues that it is entitled to lost rental income, because CFSA has not removed furniture and client records from Unfoldment's facilities. Unfoldment claims costs in excess of $800,000 in this regard. As we have stated above, the Contract does not permit cost reimbursement of any kind, and accordingly, this Board is not authorized to award such costs. The Contract never permitted Unfoldment to charge for maintaining these facilities, storing furniture once the contract option expire or for storage of the client files. Unfoldment is not entitled to lost rental income under any of its theories of recovery.

With respect to the case files in Unfoldment's possession, we direct that CFSA make arrangements to remove these files from Unfoldment's property within one month of the date of this decision. Article XI of the Contract entitled Records states that "All records will revert to the Receiver after termination of this contract." The responsibility to move the files does not, however, entitle Unfoldment to any sums beyond those that it has already received.

Count Two – Unpaid Invoices for Services Rendered.

Unfoldment acknowledges that CFSA paid it $201,825.58 for outstanding invoices. It claims that the total amount of the invoices was $275,404.23, and further that due to CFSA's delay in payment that it has incurred damages and lost income in an undetermined amount in excess of $100,000. Unfoldment is not entitled to any damages or lost income for CFSA's delayed payment.

CFSA states that it was able to verify less than half of the amount Unfoldment claimed. CFSA paid Unfoldment $201,825.58 for actual invoices. The District claims that CFSA paid Unfoldment for more than it was entitled to. This unadorned statement of the District's is not sufficient to establish the lack of a disputed fact.

With respect to Unfoldment's claim that it is still owed for outstanding invoices, we deny the District's motion for summary judgment. We, however, order Unfoldment to present within 30 days a detailed accounting of what invoices remain unpaid.

Unfoldment also seeks payment for 60% of its available bed space over the 17-month contract period thereby establishing a minimum usage. The contract had no minimum, only a maximum, and the contract only permits payment for the actual number of youth who were placed in Unfoldment's facilities. Accordingly, we grant the District's motion to dismiss Unfoldment's claim for "adjusted invoices."

Count Three – Close Out Costs.

Unfoldment claims that it is entitled to a yet undetermined amount in excess of $100,000 for "close out costs" from October 28 to December 28, 1998. This period corresponds to the 60-day close out period permitted by the General Receiver. In its Opposition, Unfoldment lists close out costs to be among other things lease costs, unexpired leases on automobiles for the program, severance pay, health care benefits, moving and storage costs, legal and administrative costs. None of these costs is recoverable under this Contract. We therefore grant the District's motion for summary judgment for Unfoldment's claim for closing costs.

Count Four – Contract Termination Costs.

The Board has ruled that the contract expired under its own terms, and Appellant is not entitled to any termination costs including initial costs, proposal preparation costs, lost profits and other fees and costs. We therefore grant the District's motion for summary judgment for .

Count Five –Interest Payments.

Unfoldment alleges that it is due Quick Payment Act interest and simple interest on late paid invoices. The District challenges Unfoldment's entitlement to any QPA interest because it argues there was a dispute over the amount owed, and it disputes Unfoldment's entitlement to simple interest because it argues that Unfoldment has been paid for all of its work under the Contract. The District has not demonstrated it's entitlement to judgment as a matter of law and accordingly, we deny its motion for summary judgment with respect to interest payments. We are, however, interested in seeing Unfoldment present within 30 days, a detailed formulation of its claim for QPA including a list of invoices, dates of submission, dates of payment and a calculation of interest due.

Count Six – Refusal to Pay Settlement Costs.

Unfoldment alleges that CFSA's refusal to settle Unfoldment's claims and pay settlement costs in a timely manner has caused Unfoldment damages. This is not a claim cognizable under the PPA. This count is dismissed.

Count Seven – Bad faith and Material Breach of Contract.

Unfoldment alleges a multitude of failures by CFSA which it characterizes as bad faith and material breaches. These claims are irrelevant to what is material in this case and the bad faith and material breach of contract claims are dismissed.

Count Eight –Defamation and Reputation-Plus Claim

This is not a claim cognizable under the PPA. The defamation and reputation-plus claim is therefore dismissed.

Count Nine – Interference with Unfoldment's Contract.

These facts are irrelevant to the issues that are cognizable by this Board. Therefore, this claim is dismissed.

Count Ten – Attorney's fees.

Neither the PPA nor the Contract permit the payment of attorney's fees and costs of settlement in the expiration of an option. This claim is therefore dismissed.

D. Disqualification of Counsel

There is one remaining matter which the Board must address and that is the status of Unfoldment's counsel in this matter. The District has requested that the Board disqualify Ms. Reed from representing Unfoldment, because she would most certainly be called as a witness in this matter. Rule 3.7 of the District of Columbia Rules of Professional Conduct provides, in pertinent part:

> (A) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) The testimony relates to an uncontested issue;
> (2) The testimony relates to the nature and value of legal services rendered in the case; or
> (3) Disqualification of the lawyer would work substantial hardship on the client.

The Board finds that exceptions (1) and (2) do not apply to Ms. Reed, and because she has a co-counsel in this matter we find that her disqualification will not work a substantial hardship on

Unfoldment. Accordingly, we disqualify Ms. Reed as an attorney in this matter.

E. Further Proceedings

The Board has ruled that Unfoldment has the right to pursue its claim for unpaid invoices and for interest. The Board has given Unfoldment 30 days to present a detailed claim of unpaid invoices, demonstrating what it has not been paid for, and 30 days to develop its QPA and simple interest claim. No other claims which Unfoldment has presented hold any merit.

SO ORDERED.

DATE: March 20, 2002

LORILYNE. SIMKINS
Chief Administrative Judge

MATTHEW S. WATSON
Administrative Judge

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

MCI CONSTRUCTORS, INC.	)	
	)	CAB No. D-1056
Under Contract No. 91-0037-AA-2-0-LA	)	

For the Appellant: J. Jonathan Schraub, Esq., Robert E. Draim, Esq., Schraub & Company, Chtd.. For the District of Columbia: Jack M. Simmons, III, Esq., Assistant Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Administrative Judge Matthew S. Watson, concurring.

OPINION

CourtLink Filing ID 609146

Appellant MCI Constructors, Inc., seeks compensation on behalf of a sub-tier contractor, Saftronics, Inc., in the amount of $272,735, plus interest, for additional material and labor supplied on a contract after the District of Columbia Water and Sewer Authority ("WASA") rejected Saftronics' interpretation of the specifications that harmonic distortion was to be measured at the primary side (4,160 Volts) of WASA's transformers rather than the secondary side (480 Volts) of the transformers. Because we conclude that Saftronics interpretation was reasonable, WASA's rejection was a change to the contract entitling Appellant to compensation for the change. We find Appellant entitled to $251,118, plus interest on that amount pursuant D.C. Code § 2-308.06.

FINDINGS

The relevant facts are not in dispute. In February 1993, MCI was awarded Contract No. 91-0037-AA-2-0-LA by the District's Department of Public Works, Water and Sewer Utility Administration (the predecessor in interest to WASA) to make specified improvements to the secondary treatment facilities at the Blue Plains Wastewater Treatment Plant located in the District of Columbia. (Stipulations of the Parties ¶¶ 1-2, filed November 16, 1999). The total contract price was in excess of $10 million.

MCI, the general contractor on the Blue Plains project, issued a subcontract to Prince Georges Contractors, Inc ("PGC") to provide certain mechanical supplies required under the Prime Contract. (Stipulations ¶ 3). PGC issued a subcontract to Ingersoll-Dresser Pump Company ("IDP") for pumps, motors, variable frequency drives ("VFDs"), and related supplies and services needed for the Blue Plains project. (Stipulations ¶ 4). In May 1993, IDP issued two purchase orders, Nos. 33-0922642 and 33-092644, totaling $725,000, to Saftronics for the necessary VFD systems and related supplies and services. (Stipulations ¶ 4; Tr. 75; Appellant's Exhibits (AEX) 19-20).

The Prime Contract specifications were prepared for the District by Greeley and Hansen, an engineering firm located in Maryland. (Stipulations ¶ 5). Section 11006 of the specifications set forth the requirements related to the VFD systems. Section 11006.05.A.2.d. states:

> Individual or simultaneous operation of the adjustable frequency drives on any common bus shall not contribute more than 5 percent additional harmonic voltage distortion to the bus in accordance with IEEE [Standard] 519. Each drive shall have either an a-c input line harmonic filter or a transformer to limit the harmonic distortion. The harmonic filter shall be connected to the line side of the drive through a contactor.

(AEX 3).

The 1992 version of IEEE Standard 519, entitled "IEEE Recommended Practices and Requirements for Harmonic Control in Electrical Power Systems," is 100 pages in length and contains 14 sections. (AEX 2). The Introduction (Section 1) to IEEE 519 states that it is to be used for guidance in the design of power systems with nonlinear loads. Nonlinear devices include static power converters such as adjustable speed drives. According to IEEE 519, nonlinear loads change the nature of the ac (alternating current) power current resulting in the flow of harmonic currents in the power system that can cause interference with communication circuits and other types of equipment. (AEX 2, at 7). Because harmonic voltage and current distortion is undesirable, devices such as harmonic filters and transformers are used to limit the harmonic distortion.

Section 10 of IEEE 519, entitled "Recommended Practices for Individual Consumers," describes current distortion limits that apply to individual consumers of electricity while Section 11 describes the quality of electricity that the utility (producer) should furnish to the consumer. Section 10 states in pertinent part:

> These limitations are for the benefit of all parties involved. This recommendation . . . focuses on the point of common coupling (PCC) with the consumer-utility interface. . . . It would be ideal if it were possible to control harmonics to such an extent that harmonic effects . . . were nil at every point in the entire system encompassing the consumer's own circuit, the utility circuit, and other consumers' circuits. In reality, however, economic factors and the effectiveness of the harmonic control must be balanced; and some harmonic effects are unavoidable at some points in the system. The recommendation described in this document attempts to reduce the harmonic effects at any point in the entire system by establishing limits on certain harmonic indices (currents and voltages) at the point of common coupling (PCC), a point of metering, or any point as long as both the utility and the consumer can either access the point for direct measurement of the harmonic indices meaningful to both or can estimate the harmonic indices at point of interference (POI) through mutually agreeable methods. Within an industrial plant, the PCC is the point between the nonlinear load and other loads.

(AEX 2, at 75).

The key issue in this case is whether specification section 11006.05.A.2.d, in conjunction with IEEE 519, requires that the amount of harmonic voltage distortion be measured on the primary (4,160V) side of the main transformers (as Saftronics argues) or on the secondary (480V) side of the transformers (as WASA argues). There is no question that Saftronics' proposed equipment and filters met the 5 percent harmonic distortion requirement when measured on the 4,160V side of the transformers but did not meet it when measured on the 480V side. Ultimately, WASA required Saftronics to meet the 5 percent requirement on the 480V side, and Saftronics now seeks recovery of the additional costs it incurred in providing additional filtering equipment to meet that requirement.

Prior to publication of the District's specifications, in about 1990, Mr. Kohn of Greeley prepared calculations for the District which (according to the District's Gregory Bloomstein) expressly identified the point of calculation for harmonic analysis as the 480 Volt bus of the main transformers. (Tr. 291). Unfortunately, the District did not provide this document to the bidders or their suppliers and it was never made available to MCI or its subcontractors, including Saftronics. At the hearing, the Board was informed that the document had been lost. (Tr. 287-288).

At the pre-bid meeting in March 1992, attended by 43 individuals, including representatives of WASA, Greeley, and Metcalf & Eddy (WASA's construction manager for the project), as well as prospective bidders, subcontractors, and suppliers, no one raised any question concerning the meaning or interpretation of specification section 11006.05.A.2.d. (Stipulations ¶ 8). Nor did the representatives of WASA, Greeley, or Metcalf discuss or clarify the meaning of section 11006.05.A.2.d.

Prior to submitting its bid, Saftronics personnel reviewed the specifications, including section 11006.05.A.2.d., as well as IEEE 519, which is referenced in that section. (Tr. 32, 36-37). Based upon its review of the documents, Saftronics satisfied itself that it was designing components for the Blue Plains project in accordance with section 11006.05.A.2.d and IEEE 519. (AEX 11, 13-17).

The materials proposed by Saftronics, including the use of 3 percent input line reactors, were consistent with Saftronics' analysis that the calculation of harmonic distortion was to be taken on the 4,160V side of the transformers. (Tr. 65). In the electrical engineering industry, a reactor such as the 3 percent input line reactor falls within the definition of "filter" or "harmonic filter." (Stipulations ¶ 13). Section 3.1 (Definitions and Letter Symbols) of IEEE 519 defines "filter" as a "generic term used to describe those types of equipment whose purpose is to reduce the harmonic current or voltage flowing in or being impressed upon specific parts of an electrical power system, or both." (AEX 2, at 9).

Following contract award, Saftronics was obligated to submit to WASA a preliminary harmonic analysis pursuant to section 11006.03.B.9 of the specifications. (Stipulations ¶ 10). In August 1993, Saftronics delivered a preliminary harmonic analysis to WASA. Metcalf & Eddy responded by requesting a revised analysis showing all variable frequency drives running simultaneously. Saftronics retained Mr. Conrad St. Pierre, one of the experts who testified for Saftronics at the hearing, to prepare the revised harmonic analysis. Saftronics asked Mr. St. Pierre to

perform a harmonic analysis in accordance with IEEE 519, without specifying the point at which he should take the measurement. Mr. St. Pierre independently determined that the calculation should be taken at the 4,160V side of the transformers. (Tr. 207-209). Mr. St. Pierre's analysis was transmitted to WASA in November 1993. (Stipulations ¶ 12). His calculations showed harmonic distortion of 2.8 and 3.6 percent on the 4,160V side of each transformer using a total of 42 separate 3-percent reactors proposed by Saftronics. Without the filters, the harmonic distortion would have been 6.2 and 7.8 percent, which amounts are in excess of the 5 percent contract limitation. (Tr. 213-215).

Based on the undisclosed Greeley study which called for measuring at the 480V side of the transformers, a consultant hired by Metcalf, acting on behalf of WASA, rejected the revised harmonic analysis. Metcalf then issued a written directive for WASA requiring that Saftronics "provide harmonic analysis that shows the voltage harmonic distortion at common buses 480 volts . . . to comply with the requirements of 5% limit of harmonic distortion. The 480 VAC buses shall be considered as points of common coupling (PCC) in accordance with the Specification Section 11006.05.A.2.d and IEEE 519. . . ." (AEX 22). This was the first notice to Saftronics identifying the 480V side of the transformer as the point of calculating harmonic distortion under section 11006.05.A.2.d. (Tr. 80). Despite a number of meetings, the contracting parties were unable to resolve the disputed interpretation. Saftronics ultimately complied with WASA's directions and provided additional design and filtering equipment to satisfy the 5 percent harmonic distortion limitation at the 480V side of the transformers. (Tr. 82-83).

On July 29, 1994, Saftronics requested a change order for the increased costs incurred as a result of WASA's interpretation of section 11006.05.A.2.d. In an August 13, 1995 letter, WASA stated that Saftronics' change order request was unjustified. Saftronics responded to that letter on September 21, 1995. (AEX 31). In a letter dated October 3, 1995, MCI forwarded Saftronics September 1995 response to WASA's contracting officer, requesting a final decision. The contracting officer has never issued a final decision. On September 18, 1998, MCI filed an appeal with the Board from the deemed denial arising from the contracting officer's failure to respond to MCI's October 3, 1995 request for a final decision. (Stipulations ¶ ¶ 19-22).

At the Board hearing, Saftronics introduced the testimony of two experts in the field of harmonic distortion and the interpretation of IEEE 519: Mr. Ray Stratford and Mr. Conrad St. Pierre. Both of these experts supported Saftronics' determination that section 11006.05.A.2.d called for the harmonic calculation to be taken at the primary side (4,160V) of the transformers.

Mr. Stratford is a licensed professional engineer who helped pioneer studies and techniques in the area of harmonics. (Tr. 137-142). Mr. Stratford developed original techniques for analyzing harmonic distortion, and he was instrumental in the development of the IEEE standards. (*Id.*) He was Chairman of the Static power Converter Committee of the IEEE in the early 1970s when the Committee initiated work on an harmonic standard, through 1981, when the Committee established the first harmonic distortion standards. (Tr. 138-140). Mr. Stratford was then Co-Chairman of the IEEE working group that produced the 1992 version of the IEEE standard applicable in this case. (Tr. 142).

Mr. Stratford has taught numerous industry courses relating to harmonics and industrial power systems, and has written extensively throughout his professional career on topics including harmonic distortion.

Mr. Stratford explained that IEEE 519 sets certain criteria for the current and voltage quality that the producer, *i.e.*, the utility, must produce, as well as to limit the amount of harmonic distortion that a user inserts back into the power system. (Tr. 157-158). According to Mr. Stratford, IEEE 519 identifies the point of common coupling as the point at which the utility is furnishing power to the user. (Tr. 158-159). Mr. Stratford testified that in the case of the Blue Plains project, "I would interpret ... that this would be at the 4160-volt level, where the utility is feeding power into this section of the plant at 4,160 volts." (Tr. 159, 181).

Saftronics' other expert, Mr. Conrad St. Pierre, has performed numerous harmonic analyses (between 20 and 40) since 1985 and has taught seminars and written extensively in the area of harmonics and other topics. (Tr. 202-206). Mr. St. Pierre concurred with Mr. Stratford's opinion concerning the meaning and intent of IEEE 519 and the that Saftronics properly measured harmonic distortion at the 4,160V side of the main transformer. Mr. St. Pierre independently determined that the calculation should be taken at the 4,160V side and he concluded that Saftronics' proposed system satisfied the 5 percent harmonic distortion limit. (Tr. 207-209, 212-215).

WASA's expert, Mr. Robert Mathisen, appears to have less experience in the area of harmonics than Mr. Stratford and Mr. St. Pierre. (Tr. 353-355). Mr. Mathisen agreed with Saftronics' experts that Section 10 of IEEE 519 has to do with the condition of the electric current returning to the utility and that too much harmonic filtering may have a detrimental effect on the power system due to interactions. (Tr. 309-311). Nevertheless, Mr. Mathisen focused on the sentence in Section 10 of IEEE 519 which states: "Within an industrial plant, the PCC is the point between the nonlinear load and other loads." He believes that Blue Plains is an industrial plant and therefore this exception in IEEE 519 applies to the case here and requires measuring harmonic distortion at the 480V side of the transformers. No one disputes that the 480V bus is the point between the nonlinear loads and other loads in this section of the Blue Plains facility. Mr. Stratford stated that the intent of the "industrial plant" exception was to provide a limited exception for a large industrial plant that has its own utility section within the plant. (Tr. 162-163). Mr. Stratford did not believe that the exception applied to Blue Plains because it does not have such a utility section within it. We find Mr. Stratford's testimony to be credible.

The District argues that Appellant bears responsibility for not seeking clarification of the contract language which it says is ambiguous. Mr. Mathisen testified for WASA that he found ambiguities in the contract documents that required a prudent bidder or supplier to seek clarification from WASA concerning *inter alia* the meaning of section 11006.05.A.2.d. On the other hand, Mr. Mathisen testified that he would not need to specify which bus should be used for the harmonic distortion measurement because "to . . . [him] it's very clear in IEEE 519 that the bus is the 480 volt bus." (Tr. 357). We conclude that the language was not patently ambiguous such that a prudent contractor should bear responsibility for seeking clarification. *See, e.g., United States v. Turner Construction Co.*, 819 F.2d 283, 285-86 (Fed. Cir. 1987).

Based on our review of the specification, IEEE 519, and the testimony of the experts, we find that Saftronics reasonably interpreted the specification at section 11006.05.A.2.d as indicating that the calculation of harmonic distortion be taken on the primary (4,160V) side of the transformers rather than on the secondary (480V) side. The District's suggestion that the 4,160V side is not the point of metering with the utility is irrelevant because the record demonstrates that Saftronics' equipment met not only the 5 percent limit at the 4,160V side but also would satisfy the same distortion requirement at higher voltage points upstream from the transformers in question. We do not need to find the District's interpretation of section 11006.05.A.2.d to be unreasonable, because as drafter of the specification, it bears responsibility for not drafting the specification to clearly indicate that it wished the measuring point to be at the 480V side of the transformer. Restatement (Second) of Contracts § 206 (1979). The specification as written does not require the measurement at the 480V bus and the District never disclosed to bidders the Greeley pre-bid study indicating the design engineer's concept of calculating harmonic distortion at the 480V bus. Accordingly, Appellant is entitled to recover its increased costs of performance for complying with WASA's directive to calculate harmonic distortion at the 480V side of the transformer and to provide additional services and equipment to meet the more stringent requirements.

For the most part, quantum is not disputed. At the start of the hearing, Appellant sought $236,542, consisting of Saftronics' material costs of $156,617, direct labor of $16,560, engineering of $11,961, plus mark-ups for Ingersoll Dresser Pump Company, MCI, and bond and warranty. During the hearing, Appellant revised its quantum to $272,735, by adding an additional amount of $16,560 to direct labor and $11,961 to engineering (plus associated increases in the mark-ups on these amounts) in order to include labor burden. We find that a more reasonable amount for burden is $6,624 for direct labor and $4,784 for engineering. Thus, Saftronics' total costs equal $196,547. Adding mark-up for Ingersoll Dresser Pump ($29,482), MCI ($22,603), and bond and warranty ($2,486), yields a total quantum of $251,118 for the contract change. At the hearing, the District's witness challenged the amount of the credit ($12,000) for the 3 percent reactors which Saftronics did not ultimately use. (DEX M). We find that the record produced by Saftronics adequately supports the amount of the credit.

In a final argument, the District argues that we lack jurisdiction over the appeal because MCI never filed an appeal with the former Director of the Department of Administrative Services, prior to filing its appeal with the Board. This argument is not well taken. The disputes process was amended by the Procurement Reform Amendment Act of 1996, D.C. Law 11-259, 44 D.C. Reg. 1423 (Mar. 14, 1997), which eliminated the intermediate step of appealing to the DAS Director from a denial or deemed denial of a claim by the contracting officer. *See Eboné, Inc.*, CAB Nos. D-0971, D-0972, May 20, 1998, 45 D.C. Reg. 8753, 8773 & n.14. By the time MCI filed its claim, there was neither a DAS Director nor a statutory procedure for appealing to the DAS Director. The District also relies on 27 DCMR § 3803.5 (1988) to support the obsolete DAS Director appeal procedure and the timing of an appeal from a deemed denial. We hold that section 3803.5 has been superseded by amendments to the PPA. When faced with changes in the statutory disputes process and government procurement reorganizations, we ask whether the change has deprived a party of any substantive rights. In this case, only procedural rights, not substantive rights, have been implicated. *Fry & Welch Associates*, CAB No. D-0821, July 31, 1999, 44 D.C. Reg. 6859, 6876-77. MCI properly followed the applicable disputes procedures when in filed its appeal directly with the Board in 1998.

CONCLUSION

MCI is entitled to $251,118, plus interest on that amount pursuant D.C. Code § 2-308.06, starting from October 3, 1995.

SO ORDERED.

DATED: March 27, 2002

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

M&G SERVICES, INC.)
) CAB No. P-0652
Under Solicitation No. POAM 2002-B-0006-AE)

For the Protester: Mr. Neil Goldsworthy, pro se. For the Government: Howard Schwartz, Esq., and Warren J. Nash, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Matthew S. Watson, concurring.

OPINION

Courtlink Filing ID 683921

Protester, M&G Services, Inc., has protested against award to the apparent low bidder, Forney Enterprises, Inc., alleging that Forney does not have the equipment to perform the work. The District has moved to dismiss the protest on the ground that M&G is not a certified small business enterprise ("SBE") and therefore lacks standing to protest the award of a contract set aside for small businesses. M&G has not responded to the motion. Because M&G is not a certified SBE, it was not eligible to bid on this set-aside procurement and therefore lacks standing to protest. Accordingly, we dismiss its protest.

BACKGROUND

On February 21, 2002, the Office of Contracting and Procurement ("OCP") issued IFB No. POAM 2002-B-0006-AE for site work at 401 Farragut Street, N.E., Washington, D.C. (Ex. 1). OCP set aside the IFB for certified SBEs by checking block 6 on page 1 of the solicitation and including the SBE set-aside clauses in Section M of the solicitation. (Ex. 1). On March 8, 2002, five bidders, including M&G and Forney, submitted bids in response to the IFB. (Ex. 3). M&G is not certified as an SBE by the Local Business Opportunity Commission ("LBOC"). (Exs. 3, 5). On March 12, 2002, M&G filed its protest challenging the award to Forney. The District awarded a letter contract to Forney on March 26, 2002. (Ex. 4). On March 27, 2002, the Chief Procurement Officer signed a "Determination and Findings to Proceed with Award After Receipt of a Protest" which was filed with the Board on April 1, 2002.

DISCUSSION

An entity which is not certified by the LBOC as a small business is not eligible for award of a contract in the small business set-aside market and thus lacks standing to protest an award.

Maryland Construction, Inc., CAB No. P-0650, Jan. 17, 2002, 13 P.D. 8218; *J&K Distributors, Inc. of Washington, D.C.*, CAB No. P-0432, June 13, 1995, 42 D.C. Reg. 4986, 4988. Because there is no dispute that M&G is not a certified SBE, it lacks standing to protest an award. Accordingly, the protest is dismissed.

SO ORDERED.

DATED: May 10, 2002

JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:

LORILYN E. SIMKINS
Chief Administrative Judge

MATTHEW S. WATSON
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:	)	
	)	
HORTON & BARBER PROFESSIONAL SERVICES, INC.	)	CAB No. P-0653
	)	
Under IFB No. POHA-2002-B-0047	)	

For the Protester: Will Purcell, Esq., Corporate Counsel. For the Government: Howard Schwartz, Esq. and Warren J. Nash, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

(Courtlink Filing ID 700223)

On January 25, 2002, the Office of Contracting and Procurement ("OCP") issued an open market IFB No. POHA-2002-B-0047, for Grass Cutting Services for the Department of Parks and Recreation ("DPR"). (Agency Report "AR" Ex. 1). On February 11, 2002, 11 bids were opened. (AR Ex. 2). H&B submitted the lowest bid in the amount of $2,362,565.[1] (AR Exs. 2 and 3). Lawn Restoration Services, Inc. ("Lawn Restoration") submitted the next lowest bid of $4,323,321.[2] (AR Exs. 2 and 7).

On February 27, 2002, the Contracting Officer signed the Determination and Findings for Unreasonable Bid Price ("H&B D&F"). (AR Ex. 4). In the H&B D&F, the Contracting Officer considered: 1) the original estimate of the Program Office, 2) the current price paid for the service, 3) the government estimate per acre, 4) the DOL wage rates, and 5) the number of man-hours needed for the work. (AR Ex. 4). Although, after bid opening, the contracting officer discussed other matters with protester's personnel, the District concedes that the contracting officer did not request verification of H&B's low bid or any justification of its amount. Nevertheless, the Contracting Officer determined that H&B's bid price was unreasonably low. Accordingly, H&B was determined to be nonresponsible.

On February 26, 2002,[3] the Contracting Officer determined Lawn Restoration to be responsible. (AR Ex. 6 "Lawn Restoration D&F"). Subsequent to the contracting

[1] Bids were evaluated for the total price of the base year and 4 option years. The H&B base year price was $ 516,595 for an average $30 per acre.

[2] The Lawn Restoration base year price was $ 752,939 for an average $45 per acre.

[3] No AR Explanation was given as to why the finding of responsibility of the second low bidder was AR Executed before the finding of nonresponsibility of the low bidder.

officer executing the two D&Fs, a successor contracting officer was appointed. On March 6, 2002, the Successor Contracting Officer awarded the contract to Lawn Restoration. (AR Ex. 7). Prior to award, the Successor Contracting Officer, who had not made the H&B nonresponsibility determination, discussed the H&B bid with an OCP cost analyst. The analyst considered the H&B price to be unrealistically low. The Successor Contracting Officer did not consider H&B's low bid to have been a mistake by H&B, but rather believed that H&B was "buying in," that is submitting an unreasonably low price with the expectation of recouping its losses through equitable adjustments. See FAR §3.501, The Successor Contracting Office did not request any further information from H&B. (AR Ex. 5 and AR Ex. 9).

On March 22, 2002, H&B filed the present protest contending that the District violated §2204[4] of the Procurement Regulations, Obtaining Information for Determination of Responsibility, by failing to request H&B to justify its low bid.[5] In the absence of any request for verification or justification of the low bid, we find the Determination and Findings for Low Bid Price to be premature and sustain the protest.

Relying on §2200.5 of the D.C. Procurement Regulations, 27 DCPR §2200.5, the District asserts that the contracting officer may determine a bidder nonresponsible if its bid price is unreasonably low or unrealistic, without any discussion with the apparently low bidder.[6] We disagree with this position. Although the referenced section does not itself include a direction that the contracting officer must permit the offeror to verify and explain its bid, the section specifically states that "the contracting officer may determine the prospective contractor to be *nonresponsible* [emphasis supplied]" based on the unreasonably low bid.

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[4] Protester also alleged a violation of §2202.6 which requires reference of responsibility determinations of *certified* disadvantaged businesses to the Minority Business Opportunity Commission. The "grass cutting services" which are sought are categorized pursuant to National Institute of Government Purchase (NIGP) as Code 98836 "Grounds Maintenance: Mowing, Edging, Plant (Not Tree) Trimming, etc." Although H&B is certified within NIGP Code 98852 "Landscaping (Including Design, Fertilizing, Planting, etc., But Not Grounds Maintenance or Tree Trimming Services," it is not certified in NIGP Code 98836 which includes mowing. Thus H&B is not certified within the business category covering the contract services sought by this procurement and consequently lacks standing to raise issues regarding disadvantaged business status. See, *M&G Services, Inc.*, CAB No. P-0652, May 10, 2002, 13 P.D. 8239 (*Courtlink Filing ID 683921*). Since the subject procurement is not a "set-aside," procurement, but rather an "open market" procurement, lack of certification does not effect H&B's eligibility for award.

[5] On April 4, 2002, the District notified the Board and the protester that OCP had issued the Determination to Proceed with Contract Performance while a Protest was Pending. Opposition to proceeding with the contract was not timely filed. *Order*, April 18, 2002 (Courtlink Filing ID 640124).

[6] Section 2200.5 states:

> If the contracting officer determines that the price bid or offered by a prospective contractor is so low as to appear unreasonable or unrealistic, the contracting officer may determine the prospective contractor to be nonresponsible.

In order to determine the bidder to be nonresponsible, the contracting officer must follow the instructions of §2204 of the Procurement Regulations entitled "Obtaining Information for Determination of Responsibility." Subsection 2204.2 requires that "[t]he contracting officer *shall* obtain information regarding the responsibility of a prospective contractor who is the apparent low bidder [emphasis supplied]" and the immediately following subsection, 2204.4, requires that "[t]he prospective contractor shall promptly supply information requested by the contracting officer regarding the responsibility of the prospective contractor."

A bid believed to be unreasonably low may reasonably give rise to suspicion that the bidder has made a mistake in its bid. See *e.g., Foley Company*, B-241678, Feb. 8, 1995. In such event, a contracting officer is required to seek verification from the bidder. Section 1536.2 of the Procurement Regulations provides:

> In cases of apparent mistakes and in cases where the contracting officer has reason to believe that a mistake may have been made, the contracting office *shall* request from the bidder a verification of the bid and call attention to the suspected mistake. [emphasis supplied]

The Successor Contracting Officer's assertion that he did not believe that a mistake had been made, but rather that H&B had intentionally submitted an unreasonably low bid for the purpose of buying-in is neither persuasive nor reasonable. The Comptroller General has consistently held that buying-in, even if the bid is below cost, is not grounds for refusing to award a contract to the low bidder. *DOD Contracts, Inc*, B-227689.2, Dec. 15, 1987, 87-2 CPD ¶591; *Salz Lock and Safe*, B-227547, July 6, 1987, 87-2 CPD ¶ 18; *American Maid Maintenance*, B-225571, Jan. 9, 1987, 87-1 CPD. ¶ 47. If buying-in were suspected, the District, after award, must insure that the contractor will live up to its obligations.

Without having requested a verification or explanation of the price from H&B, neither the Contracting Officer, nor the Successor Contracting Officer, had a reasonable basis to conclude that what they considered an unreasonably low bid was an attempt to buy in and not a mistake. "At a minimum, the information should have suggested to the contracting officer to conduct a more careful review of [the allegedly unreasonably low bid], including, for example, a request for information concerning the [low bidder's] estimates of manhours and costs. *C.P.F. Corp.*, CAB No. P-0413, Nov. 18, 1994, 42 D.C. Reg. 4902.

Since H&B was never given an opportunity to explain its bid, we find that the rejection of its bid was premature. See *Contract Services Co., Inc.*, 66 Comp. Gen 468 (1987), 87 CPD ¶521. H&B has verified that its bid was intended and not mistaken by filing of this protest. H&B has also provided a logical explanation of why it believes that it can perform the contract at a lower price, that it is the only bidder which garages its vehicles in the District and thus is closer to the job site, reducing travel time for the vehicles and personnel. We therefore sustain the protest.

The fact that we have found that the original determination to reject H&B's bid was premature is not a finding that H&B is responsible. That determination must be affirmatively made by the contracting officer. We therefore direct the Successor Contracting Officer reconsider H&B's responsibility, including raising his concerns about the price with H&B, and issue a further Determination and Finding of H&B's responsibility. In reconsidering the H&B's responsibility, the Successor Contracting Officer shall give great weight to the responses he receives from H&B. *See Bulloch International*, GSBCA No. 10168-P, Sept. 22, 1989, 90-1 BCA ¶22,296 If the Successor Contracting Officer determines that H&B is not responsible based on a finding that the bid price is unrealistically low, he shall make explicit reference in the D&F to each of H&B's positions in support of its bid, as well as specific findings and conclusions with respect to each. *See Kopff v. District of Columbia Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1384 (D.C. 1977)

If the successor contracting officer determines H&B to be responsible, the contract with Lawn Restoration shall be terminated and a contract for the remainder of the base year, together with the District's options for future years shall be awarded to H&B to commence performance no later than June 17, 2002. The successor contracting officer shall file his determination and finding with the Board no later than May 31, 2002.

As with any determination by a contracting officer, a finding of nonresponsibility may be protested to this Board.

SO ORDERED

DATED: May 20, 2002

MATTHEW S. WATSON
Administrative Judge

CONCURRING:

LORILYN E. SIMKINS
Chief Administrative Judge

JONATHAN D. ZISCHKAU
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

G&S Associates	)	
	)	CAB No. D-1136
Under Contract No. 8083-AE-NS-4-WM	)	

ORDER OF DISMISSAL

The District filed a motion for summary judgment or in the alternative, for involuntary dismissal on April 24, 2002. On May 17, 2002, the District filed a companion motion requesting that the Board treat the April 24, 2002 motion as conceded On June 3, 2002, the Board issued an **Order to Show Cause** why the case should not be dismissed with prejudice for failure to prosecute, pursuant to Board Rule 121.3 (49 D.C. Reg. 2096 (Mar. 8, 2002)). Appellant had ten (10) days from the date of the order to respond and if good cause was not shown, the Board informed appellant's counsel that the case would be dismissed. The appellant has failed to respond to the Board's Order to Show Cause. We therefore dismiss the appeal with prejudice. Accordingly, the final decision of the Contracting Officer is now enforceable.

STATEMENT OF FACTS

The notice of appeal in this case was filed by appellant's counsel on December 15, 2000, declaring that the District was seeking recoupment of $969,296.69 against G&S for advanced payments that exceeded the amounts invoiced by G&S under Contract No. 8083-AE-NS-4-W. In the notice of appeal, G&S asserted its own claim for $314,030.17 in direct costs and $597,722.44 in termination costs. G&S maintained that it owed the District only $88,246.39 rather than the $969,296.69, as determined by the Contracting Officer.

On July 26, 2001, the District filed an Appeal File. Among the documents in the Appeal File, the District included: (1) the Contracting Officer's Final Decision of September 15, 2000, which denied G&S's unsupported claims for termination costs and direct costs, and reasserted the claimed amount owing the District. (Appeal File ("AF"), Exhibit 1); (2) the Notice of Claim under Contract No. 8083-AE-NS-4-WM, dated October 15, 1999, indicating that the District had made advance payments to G&S on December 1, 1998, and February 1, 1999, in the amounts of $550,000 and $449,999 respectively for a total of $999,999. The Notice of Claim also states that G&S submitted invoices to the District under the Contract in the total amount of $30,702.31, and that the District was seeking reimbursement of $969,296.69, the difference between the invoiced amount and the amount of advanced payments (AF, Exhibit 9); and (3) A Notice of Termination of the Appellant's contract for convenience of the government, dated July 19, 1999. (AF, Exhibit 15).

On September 17, 2001, the Board held a telephone conference with the parties establishing a schedule, which was agreed upon by both parties. The schedule provided that G&S would file a formal complaint by October 17, 2001, and have discovery completed by December 17, 2001.

Appellant's brief was due by January 21, 2002, and a hearing scheduled for April 15 and 16, 2002.

On November 15, 2002, the District filed a motion for enlargement of time noting that G&S had failed to file its formal complaint due on October 17, 2001, and requested an open-ended 30-day extension to answer the formal complaint whenever it was filed. The motion was granted. G&S, however, never filed a formal complaint.

On April 24, 2002, the District filed a Motion for Summary Judgment or, in the Alternative, For Involuntary Dismissal. Appellant failed to respond. On May 17, 2002, the District filed a motion requesting that the April 24, 2002 be treated as conceded. Appellant failed to respond.

Since the filing of its Notice of Appeal on December 15, 2000, Appellant has not filed any additional documents in this matter, either with regard to its claims against the District or with regard to the District's claims against it. Since the October 17, 2001, telephone conference establishing the schedule of the case, the Board has had no further contact with appellant's counsel.

DECISION

The District has moved for summary judgement, or in the alternative, for dismissal of this appeal for failure to prosecute pursuant to SCR-Civil 41-I and 41(b). We have determined that this claim should be dismissed for failure to prosecute.

SCR-Civil 41-I provides: "[I]f a party seeking affirmative relief shall have failed for 90 days from the time action may be taken to comply with any . . . order requisite to the prosecution of that party's claim, . . . the complaint . . . shall stand dismissed . . . .".

SCR-Civil 41(b) provides:

> For failure of the plaintiff to prosecute or to comply with these Rules or any other of the Court, a defendant may move for dismissal of an action of claim against the defendant . . . .[A] dismissal under this subdivision . . . operates as an adjudication upon the merits.

Board Rule 121.3 also provide for dismissal for failure to prosecute:

> Whenever either party fails to file documents required by these rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicate an intention not to continue the prosecution or defense of a case, the Board may issue an order to show cause why the case should not be dismissed for failure to prosecute or defend.

While dismissal with prejudice is a drastic remedy, it is entirely warranted here because Appellant has failed in all respects to prosecute this appeal with due diligence. *Brown v. Cohen,* 505 A.2d 77(D.C. 1986). There has been an 18-month delay since the filing of Appellant's notice of

appeal without any further action taken by the appellant to move its case along. Following the filing of an appeal with the Board, an appellant has an obligation to demonstrate a meaningful effort to prosecute the appeal. *Tech-Tron Constructors*, ASBCA No. 46367, 97-1 BCA 28,746. There has been no effort and no explanation of why Appellant has failed to prosecute its claim. Further, Appellant has violated the Board's order to file it's formal complaint. This violation extends over a seven-month period of time. The Appellant has also failed to respond to the Board's order to show cause. The entire fault for the delay of this case lies with the appellant, and these facts are undisputed. Additionally, the District has been prejudiced by the action of the appellant in that it has been delayed in recouping nearly $1,000,000 in payments that it advanced to G&S three years ago.

Pursuant to D.C. Code § 2-308.03(b) (2001 ed.): "The decision of the contracting officer shall be final and not subject to review unless an administrative appeal or action for judicial review is timely commenced as authorized by § 2-309.04." Because the Appellant has failed to prosecute its appeal, which we now dismiss with prejudice, the contracting officer's final decision of October 15, 1999, is final and enforceable.

The Board hereby **grants** the District's motion and **dismisses with prejudice** appellant's claim for lack of prosecution, pursuant to Board Rule 121.3.

SO ORDERED.

DATE: June 17, 2002

LORILYN E. SIMKINS
Chief Administrative Judge

CONCURRING:

Matthew S. Watson
Administrative Judge

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:	)	
	)	
IIU Consulting Institute, Inc.	)	CAB No. P-0656
Under IFB No. POHA-2002-B-0306	)	

For the Protester: IIU Consulting Institute, Inc., Frank Ukoh, President, *pro se*. For the Government: Howard Schwartz, Esq. and Warren J. Nash, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

(Courtlink Filing ID 775133)

IIU Consulting Institute, Inc. ("IIU" or "protester") was the higher of two bidders on an open market solicitation for Landscaping Services for the Department of Parks and Recreation, bids for which were opened on May 9, 2002. It is undisputed that the low bid submitted by Holston Brothers, Inc., ("Holston") did not include EEO material as required by Section I.8 or a Tax Certification as required by Section K.2 of the solicitation, and was not signed in the Offer section of the bid (Box 17) as required by Section L.11 of the solicitation. The bid also did not include a resume of the designated chief horticulturist as required in Section L.17, or certification of the horticulturist as required in Section C.5.1. (See Holston Bid, Agency Report ("AR") Ex. 3). The protest of IIU raises two issues for the Board's consideration: 1) whether the contracting officer may accept the bid from a bidder which did not sign the bid, and 2) whether Holston's bid was nonresponsive due to: the lack of a tax certification affidavit; the lack of EEO material; and failure to submit a resume of the designated horticulturist with the bid. A certification as a horticulturist was submitted after opening in place of the resume.[1]

The District asserts that: 1) the contracting officer may accept the unsigned bid of Holston since there is sufficient written evidence that Holston intended to be bound by its bid, and 2) that the contracting officer may permit correction of the additional deficiencies as minor informalities which are matters of responsibility, not responsiveness, permitted to be cured before award. The Board agrees with the District and dismisses the protest.

[1] The protester also alleges in its Comments on Agency Report that "the certificate accepted was issued in Maryland and not the District of Columbia as required by the IFB." The IFB only requires "a qualified part-time certified Horticulturist." In fact, there are no governmental certification programs for horticulturists. All such certifications are made by private associations. The certification submitted is from the Maryland Nursurymen's Association. It does not appear that there is any certifying association in the District of Columbia.

DISCUSSION

Unsigned Bid

Section 1535 of the Procurement Regulations deals with "Minor Informalities or Irregularities in Bids." 27 DCMR §1535. Specifically sub§2(c) provides that an unsigned bid may be accepted when:

> the bid is accompanied by other material with the bid that indicates the bidder's intention to be bound by the unsigned bid (such as the submission of a bid guarantee or a letter signed by the bidder, with the bid, referring to and clearly identifying the bid itself).

Holston's bid package included: 1) the bid envelope containing the sealed bid, the Representations and Certifications and Other Statements of Bidders (Section K), which were signed by Scott Deosaran, and 2) a list of key personnel, including the name of Scott Deosaran as Account Manager. Moreover, the bid envelope contained a label for the receipt of hand delivered bids that was signed by Scott Deosaran. (Exhibit 4). The certifications, as well as the bid receipt, identified the solicitation and signed by the representative of the bidder meet the requirements of the procurement regulations to allow acceptance of the bid without a signature in the proper box. The language of the District regulation is identical to the language of the corresponding Federal Acquisition Regulations. 48 CFR §14.405. The General Accounting Office and the Board interpret the language similarly. *See Wilton Corporation*, 64 Comp. Gen. 233 (1985), 85-1 CPD ¶128.

Lack of other specific items

We agree with the District that the lack of a tax certification affidavit, EEO material, and resume of the horticulturist were also minor informalities which could be corrected after bid opening in accordance with 27 DCMR §1535.3 which states:

> When the bidder fails to provide timely certifications or information with respect to Equal Opportunity and Affirmative Action Programs or other IFB requirements, the contracting officer may allow additional time for the submission to be made prior to award.

Each of the bid deficiencies falls within the ambit of the regulation. Further, we find that attaching a certification from a recognized trade association is substantial compliance with the resume requirement and was reasonably accepted by the contracting officer. With specific reference to the resume requirement, this matter is distinguishable from *Trifax Corporation*, CAB No. P-624, Mar. 20, 2001, 49 D.C. Reg. 3346, cited by Protester. In Trifax, the bidder "concede[d] that it never intended to designate the employees to be provided under the contract,

but only the "names of some of our [employees]" at p. 7, while in the instant case the bidder committed itself to utilize the named horticulturist.[2]

For these reasons, the Board finds that it was in the discretion of the contracting officer to find each of the oversights in the bid were "minor informalities" and permit their cure after bid opening and prior to award.

June 28, 2002

MATTHEW S. WATSON
Administrative Judge

CONCURRING:

LORILYN E. SIMKINS
Chief Administrative Judge

JONATHAN D. ZISCHKAU
Administrative Judge

NOTE

Although the Board will not interfere with the award in this matter, the Board believes that the District should impress on contractors the need to carefully and fully prepare their bids. While one can find, as we have, that each separate impropriety is, by itself, minor, there is some question as to whether the contracting officer should have considered the numerous deficiencies, in total, to show a lack of responsibility. Certainly the bidder did not prepare the bid carefully. The expectation on the part of bidders of such cavalier treatment of bidder conformity with requirements may indicate why only two bids were received on this procurement. If there was such a lack of care by the successful bidder in meeting the formal bid requirements, there may have also been a lack of care in analyzing and understanding of substantive solicitation requirements and computing the bid price. Although a

[2] The Board again notes that, as stated in the *Trifax* decision, the clause is not appropriate for formally advertised (IFB) solicitations.

lower price may be paid, it does not benefit the District in the long run to award contracts to bidders who have an erroneous understanding of the nature or difficulty of the work to be done.

We also note that bidders often ignore District of Columbia licensing requirements. In this matter, Holston submitted Maryland, rather than District of Columbia, licenses. Although this may be sufficient for bidding purposes, since there is reciprocity between the District and Maryland, 27 DCMR §2310, there is no indication in the Agency Report that District licenses were obtained before award. Notwithstanding the availability of reciprocity permitting the District to issue a District license on the basis of a Maryland license, a contractor is subject to a $500 per day fine if it fails to obtain issuance of a District of Columbia license, even if it possesses a valid Maryland license. *Department of Health v. Williams Pest Control*, DOH Office of Adjudication and Hearings, Case No.: I-00-20085 (June 6, 2001).

We believe that contracting agencies must demand attention to bid requirements and have an obligation to zealously enforce regulatory requirements of other District agencies, in particular, to insure that District licensing requirements are timely complied with.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:	)	
	)	
Koba Institute, Inc.	)	CAB No. P-0657
	)	
Under RFQ PN # 223575, and RFQ PN# 217087, 88, 89, 90	)	

For the Protester, Ian M. Paregol, Esq. For the Government, Howard Schwartz, Esq., Assistant Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson, with Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

(Courtlink Filing ID 803171)

Koba Institute, Inc ("Koba") protests the cancellation of a request for quotations using small purchase procedures to enter into a single Blanket Purchase Agreement ("BPA") for investigative services and the subsequent solicitation of the same services by awarding BPAs with 4 separate firms. Koba asserts that both solicitations were improper uses of BPAs, that the first solicitation exceeded the dollar limitation for use of small purchase procedures and that the second solicitation improperly "parceled, split, [and] divided" the solicitation in order not to exceed the dollar limitation for use of the small purchase procedures. The District moved to dismiss the protest on the grounds that, by its allegations, Koba concedes that the first solicitation was properly cancelled, that Koba lacks standing to protest the second solicitation, and further, that the protest of the second solicitation has been rendered moot by issuance of an RFP covering the same services. We conclude that the protest as to the first RFQ is moot, that Koba has standing to protest the second RFQ, however, that the protest of the second RFQ is also moot *provided that a contract pursuant to the RFP is awarded no later than August 31, 2002.* Accordingly, we dismiss the protest subject to the above proviso.

BACKGROUND

On May 3, 2002, the Office of Contracts and Procurement ("OCP"), issued a request for quotations ("RFQ 1") to establish a BPA for a single firm to investigate the background and circumstances surrounding the deaths of wards of the Department of Human Services for a period ending September 30, 2002. (Agency Report ("AR"), Ex 1). The request for quotations was sent to 4 potential offerors: Koba, The Columbus

Organization ("Columbus"), Public Interest Investigations, Inc. ("PII") and DAH Private Investigators ("DAH"). (*Id.*).

On May 7, 2002, OCP received quotes from Koba, Columbus, PII and DAH. (*Id.*). On May 24, 2002, OCP extended the submission date for submission of quotations and issued Addendum 1, which defined "interview" and requested additional pricing. (*Id.*). By fax transmission dated May 30, 2002, OCP cancelled RFQ 1 (AR, Ex. 2).

On May 31, 2002, OCP issued a request for quotations ("RFQ 2") pursuant to small purchase procedures for the identical services and term as RFQ 1 to Koba, Columbus, PII and DAH, as well as two private investigators. (AR, Ex. 3). As opposed to the contemplated single award pursuant to RFQ 1, the request stated that RFQ 2 "is to establish multiple Blanket Purchase Agreements with contractors for investigative services not to exceed $25,000.00 . . . . Awards will be made to the four (4) lowest bidders." (*Id.*). On June 4, 2002, Koba, Columbus and PII responded to RFQ 2.

On June 7, 2002, the CPO signed a D&F to Proceed with Contract Award while a Protest is Pending ("D&F"). On June 11, 2002, OCP awarded BPAs not to exceed $25,000 to Koba and Columbus. On June 14, 2002, OCP awarded a similar BPA to PII. (AR, Exhibit 4). On June 17, 2002, Koba filed a supplement to its protest. In the supplement, Koba opposed the D&F lifting the stay and additionally argued that OCP did not provide adequate time for response to RFQ 2.

On July 1, 2002, OCP issued RFP No. POJA-2002-R-0164 for Investigative Services ("RFP") soliciting proposals for a contract to be awarded to a single firm for substantially the same services as contemplated in the multiple BPAs for a term of one year commencing upon award. (Supplement to Motion to Dismiss, Ex. S-2). The RFP has a closing date for proposals of July 31, 2002. (*Id.*)

DISCUSSION

RFQ 1

"In general a case becomes moot when the issues presented are no longer alive or the parties lack a legally cognizable interest in the outcome." *See Murphy v. Hunt*, 455 U.S. 478, 481, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982). Koba alleges that RFQ 1 was too large to be issued using small purchase procedures. The remedy for such violation, if the protest were sustained, would be cancellation of the solicitation. Since RFQ 1 was cancelled by the District, apparently because OCP agreed that it was an improper use of small purchase procedures, there is no further remedy which the Board could order if it sustained Koba's protest and the protest as to RFQ 1 is therefore dismissed as moot.

RFQ 2

To have standing to protest, a party must be aggrieved. (D.C. Code §2-309.08 (2001 ed.); Board Rule 100.2(a)). Simply stated, the protester must have a direct economic interest in the outcome of the protest. *Barcode Technologies, Inc,* CAB No. P-524, Feb. 11, 1998, 45 D.C. Reg. 8723. The District asserts that since Koba has already received the maximum BPA under the solicitation, Koba has no further economic in the outcome of the protest. The fact that Koba received the maximum award *under the terms of the* RFQ does not deprive Koba of standing to question the propriety of multiple awards, each for less than the total requirement, since, if the Board sustains the protest and requires a single award, as in fact the District has provided in the RFP, Koba could possibly be awarded a contract larger than its limited BPA. Thus Koba clearly has an economic interest in the outcome of the protest and standing before the Board.

Even though Koba has standing to protest RFQ 2, the Board must dismiss a protest if the grounds of the protest have become moot. The District argues that the issuance of the RFP for the same services to replace the BPAs meets the demands of the protest for a sealed competitive procurement from a single offeror and thus renders the protest moot. It is well settled that "termination of an awarded contract for reasons that relate to the solicitation process may render a pending protest moot." *Anacostia Medical Center*, CAB No. P-115, October 27, 1988, 3 P.D. 435. In the instant matter, the solicitation protested, and awards made are for Blanket Purchase Agreements. Since the District is not required to make any purchases under a BPA, the District may accomplish the same result as terminating the BPA by merely ceasing to place purchase orders. The Board believes that the award of a contract requiring purchases of the same requirements as the described in the BPAs is the equivalent of termination, since no further orders would be placed on the BPA. The RFP issued by the District describes the same services as are described in the BPA. The issue as to whether the protested BPA has been terminated is whether the term of any contract issued pursuant to the RFP will overlap the term of the BPA and thus supplant it. It is not clear from the face of the RFP that award pursuant to it will result in a contract which begins before the end of the term of the BPA. The term of the contract to be awarded is one year *from date of award.* (Supplement to Motion to Dismiss, Ex 2, §F.1). The RFP provides for a proposal acceptance period of 120 days, (*Id.* §L.14), from the proposal submission date of July 31, 2002. Thus, while the contract could be awarded prior to the completion of the term of the BPAs and supplant the BPAs, it could also be awarded as late as November 28, 2002. To render this protest moot, the Board believes that the contract must be awarded so that there is a significant effective termination of the BPAs protested. The Board believes that, in the instant matter, this period must be no less than one month.

CONCLUSION

The Board dismisses the protest concerning RFQ 2 as moot *provided that a contract pursuant to the RFP is awarded no later than August 31, 2002.* If the contract is not awarded by that date, the Board will, upon notice from the Protester, vacate this order and consider the protest concerning RFQ 2 on the merits. Although that consideration may not permit any action affecting the BPA, if the protest is sustained the protester may be entitled to bid preparation, and or protest costs.

Dated: July 16, 2002

MATTHEW S. WATSON
Administrative Judge

CONCURRING:

JONATHAN D. ZISCHKAU
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

CLAIM OF:

CHIEF PROCUREMENT OFFICER Office of Contracting and Procurement District of Columbia Government 441 Fourth Street, N.W. Washington, D.C. 20001	)	CAB No. D-1182
Under Public Safety Systems and Products Agreement dated August 6, 1999 by and between GTE South Incorporated and the Government of the District of Columbia (Computer Assisted Dispatch)	)	

ORDER DENYING OPPOSITION TO JURISDICTION
(CourtLink Filing ID 820825)

In 1999, the District, as did much of America, faced a crisis created by the so called Y2K problem. The District believed that the Police and Fire Department's emergency dispatching system would not function into the year 2000 with potential catastrophic results. Time being short, and there being considerable competition for computer services, the District negotiated a sole source contract with GTE South, Incorporated, whose name was later changed to Verizon South, Inc. (hereinafter referred to as "GTE" or "Verizon") to install a Y2K compliant dispatch system. In the pressured period of negotiation, there apparently developed a battle of forms. GTE prevailed in using its own standard commercial form as the basis of the written contract, without regard to whether the terms of its form conformed with District procurement law.

Regardless of the form utilized, the contracting officer was constrained by the authority and requirements mandated by District of Columbia law. *See Coffin v. District of Columbia*, 320 A.2d 301 (D.C. 1974). Rather than resolving any conflicts between the District requirements and the GTE form, the contract was executed on the GTE prepared form but, in addition, provided that the agreement was to be "governed and construed according to the law of the District of Columbia without regard to choice of law principles." Article XVIII ¶ 8. As a District Government procurement, the contract's terms are subject to, among other statutory provisions, Unit A of Chapter 3 of Title 2 of the D.C. Code entitled "Procurement Practices for the District Government."

The written terms of the resulting contract and District procurement law established conflicting procedures for resolving disputes. The GTE form provided for binding arbitration "without litigation or administrative process" as the "sole remedy with regard to any claim, Dispute, or other controversy arising out of or relating to this Agreement or its breach." Article

XVII ¶ 1. The District statute, however, establishes the Contract Appeals Board as the "exclusive hearing tribunal," D.C. Code § 2-309.03(a) (2001), for "Any appeal by a contractor from a final decision by the contracting officer on a claim by a contractor, when such claim arises under or relates to a contract," *id.* (2), and "Any claim by the District against a contractor, when such claim arises or relates to a contract." *Id.* (3). Each of the parties was, or should have been, cognizant of the conflict. GTE "is a leader in government and defense communications systems and equipment." (1998 GTE Annual Report, at 27).

Verizon asserts in its Objection to Jurisdiction that it performed under the contract and made a request for full payment. (Objection to Jurisdiction, at 3). The District paid more than $2 million that was claimed by Verizon to be due and owing under the Contract, but refused to pay the final invoice in the remaining amount of approximately $2 million. The District asserts that it has refused to make further payments due to the failure of Verizon to fully perform its contract obligations. (Complaint, ¶¶ 15-29). After repeated attempts Verizon asserts it made to obtain payment, and after initial negotiation, Verizon initiated arbitration in accordance with the Verizon form contract terms. (Objection, at 3). The District filed an action in Superior Court to stay the arbitration proceedings. Verizon filed a counter-claim and an Application to Compel Arbitration in accordance with the terms that had been agreed to by the parties. On May 22, 2002, after considering the motions, the Superior Court denied the District's motion to stay arbitration and granted Verizon's application to compel arbitration. (Objection, Ex. 1).

After the Superior Court issued its order, a District contracting officer issued a final decision finding Verizon to be in breach of the contract and asserting claims against Verizon on behalf of the District. (Objection, Ex 2). The matters now before the Board are the claims of the District against Verizon resulting from the contracting officer's final decision issued after the Superior Court order. Verizon has objected to jurisdiction and requested the Board to dismiss this matter for lack of jurisdiction. The Board denies Verizon's objection and determines that the Board is the exclusive tribunal to hear the claims of Verizon and the District. Verizon's claim for payment is subsumed in the District claim against Verizon for breach of contract.

The Board is mindful of the seemingly contrary holding of the Superior Court, but does not feel itself bound by the Court's determination. First, the posture of the matter before the Board is different than the posture of the matter was before the Court. The claims before the Board are supported by a formal final decision of a contracting officer. The Court itself recognized in a footnote that "This Court is aware that the situation might be different if the facts presented an appeal from a decision by a contracting officer. No such appeal [was] present in [the case before the Court]." (Order, n.5). Although the final decision upon which the claim now before the Board is made is a determination by a contracting officer that the contractor is obligated to the District based on nonperformance, it is conversely also a decision that Verizon is not entitled to further payment for reason of the same lack of performance.

Even were the facts before the Board the same as the facts which were before the Court, the Board does not feel itself bound by interpretation of contract provisions by the Court. The District initially filed its action in Superior Court because the only effective remedy to stop the impending arbitration was an injunction in the form of a stay of the arbitration proceeding. The Board has no authority is issue injunctions. The basis of the request for stay was a denial by the

District that it had *validly* entered into any agreement to arbitrate. Asserting the invalidity of the arbitration clause to the Superior Court in opposition to the contractor's invocation of the purported arbitration clause is a final decision by the contracting officer of the invalidity of the contract provision, whether or not it is denominated as such. The Board has exclusive jurisdiction over any appeal from a decision of the contracting officer. D.C. Code § 2-309.03 (2001). Although an order of the Superior Court is necessary to effectively stay the arbitration proceeding, if there is any question raised to the Court as to the contracting officer's application of contract provisions, the court should have referred the matter to the Board for a definitive interpretation of the contract. Pursuant to the doctrine of primary jurisdiction, the arbitration should have been stayed pending consideration by the Board of the validity of the arbitration clause pursuant to District of Columbia procurement law.

> The doctrine of primary jurisdiction applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views.

Lawlor v. District of Columbia, 768 A.2d 964, 973 (D.C. 2000). The justification for application of the primary jurisdiction doctrine in this matter is much stronger than in *Lawlor*, since in this matter Verizon, whose rights may be determined, is a party to the subject contract and subject to the District's mandatory disputes procedures, while in *Lawlor* the plaintiffs were alleged to be third-party beneficiaries of the contract before the court. Since the matter should have been referred to the Board by the Superior Court for an initial interpretation of the contract provisions, it is not incumbent on the Board to be bound by the court's premature determination.

We believe that the Superior Court's interpretation of the contract was in error. The Court's ruling was based on two holdings, first, that the contracting officer had authority to commit the District to binding arbitration, and second, that there was no final decision by the contracting officer prior to the court action from which Verizon could appeal to the Board. The Superior Court erroneously interpreted the District's procurement law as to both these matters.

It has been consistently held that a contracting officer has no authority, as a matter of law, to commit the government to binding arbitration in the absence of a statutory mandate. In *Sherman R. Smoot Corp.*, CAB No. D-0847, Aug. 3, 1992, 40 D.C. Reg. 4477, this Board observed that:

> the Comptroller General has held that where provisions have been made by law for the adjustment of claims that may arise under government contracts, there is no power or authority in any administrative or contracting officer of the government, by means of a provision in a contract, to vest in an arbitration board the authority to adjust such claims, 7 Comp.Gen. 541, 542 (1928). In fact, there is no general authority for the establishing of boards of arbitration to determine the rights of the government in the absence of statutory authority. 8 Comp. Gen. 96 (1928); 19 Comp.Gen. 700 (1940). At present, arbitration clauses may be

> approved, assuming the absence of a statute, where they go no further than to provide for a determination of the fact of reasonable value, without imposing any obligation on the government, and leave no question of legal liability for determination by arbitrators, or where the arbitration could only result in an advantage to the government. 20 Comp.Gen. 95, 99 (1940); 22 Comp. Gen. 140 (1942).
>
> The Board notes at this juncture that the Procurement Practices Act of 1985, D.C. Code §§ 1-1181.1 et seq., does not provide for the rights of the District to be determined by arbitration. Rather, this Board is the exclusive hearing tribunal and has jurisdiction to review and determine de novo procurement or contractual disputes concerning the District. D.C. Code § 1-1189.3. Thus, there is no statutory authority for binding arbitration with regard to the District.

In addition to the citations in the Smoot opinion, which found no authority to enter into binding arbitration agreements, the Comptroller General has acknowledged the general rule in individual cases which have permitted arbitration agreements in matters specifically authorized by statute. 32 Comp. Gen. 333 (1953) and B-288502 (2001).

We hold that under established District of Columbia law, a contracting officer has no authority to enter into an agreement for binding arbitration and the that the provision for arbitration contained in the contract is thus of no effect. In the absence of a valid agreement for arbitration, the provisions of the United States Arbitration Act discussed in the Court's opinion are inapplicable.

We further believe that the finding of the Superior Court that at the time the matter was before the Court there was no final decision of the contracting officer over which the Board had appeal jurisdiction was also erroneous. This finding is contrary to Verizon's pleadings in the instant matter. Verizon's Objection to Jurisdiction states at page 3:

> After repeated attempts to obtain payment, and after initial dispute resolution procedures under the Contract failed, Verizon South ultimately initiated arbitration . . . .

Repeated attempts to obtain payment, particularly with the invocation of *initial dispute resolution procedures* would appear to establish that a claim had been made to the contracting officer. Although the contracting officer did not issue a final decision on the claim, "Any failure by the contracting officer to issue a decision on a contract claim within [90 days] will be deemed to be a denial of the claim, and will authorize the commencement of an appeal on the claim as otherwise provided in this subchapter." D.C. Code § 2-308.05 (2001). Thus, at the time the Superior Court considered the District's request for a stay of the arbitration proceeding, there existed, pursuant to the law of the District of Columbia which was binding by the terms of the agreement, a final decision from which Verizon could appeal and for which the Board was the "exclusive hearing tribunal."

The Objection to Jurisdiction by Verizon is DENIED. The Board finds that it has jurisdiction over Verizon to determine the claim of the District of Columbia against Verizon arising out of a District of Columbia Government contract. The Board further finds that the contracting officer had no authority to enter into any agreement on behalf of the District for binding arbitration and that any provision of the contract which purports to impose any obligation on the District to respond to an arbitration is null and void and of no effect.

SO ORDERED.

Dated: July 24, 2002

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

CONCUR:

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

AMERICAN FLAG CONSTRUCTION, INC.	)	
	)	CAB No. D-1135
Under Contract No. 91-0037-AA-2-0-LA	)	

For the Appellant: Charles R. Jones, Esq., Jenkins & Jones. For the District of Columbia: Mark D. Back, Esq., Section Chief and Assistant Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Administrative Judge Matthew S. Watson, concurring.

OPINION

CourtLink Filing ID 822334

Appellant American Flag Construction, Inc., had a contract with the District of Columbia to provide moving and hauling services to District agencies. After exercising the contract's first option which extended the contract for an additional year, the District allowed the contract to expire at the end of the first option year. The District did not exercise the option for the second year because the Appellant failed timely to correct certain tax deficiencies. Appellant filed a claim with the contracting officer seeking $1,822,917.50 in damages and an order compelling the District to exercise the second year option. When the contracting officer denied the claim, Appellant filed its appeal here, arguing that the Appellant should have been awarded the second option year or an equivalent contract. The District has moved to dismiss for failure to state a claim or, in the alternative, for summary judgment. Because we conclude that the contracting officer had no obligation to exercise the second year option, the District is entitled to prevail on summary judgment.

BACKGROUND

The relevant facts are not in dispute. In July 1998, the District awarded the Appellant a contract to provide moving and hauling services. (Appeal File ("AF") Ex. 2). The contract was for one year, with the District having the option to extend the contract for three one-year option periods. (*Id.*). The District exercised the first option in July 1999, extending the contract for an additional year. (AF Ex. 4). By letter of May 31, 2000, the contracting officer notified Appellant that it intended to exercise the contract for a second option year. (Statement of Controversy, Appellant's Ex. 1). The District letter states that "[t]his preliminary notice does not obligate the District to actually exercise the option." (*Id.*). Also on May 31, the District's Office of Contracting and Procurement faxed to Appellant a tax certification affidavit that was to be completed and signed by Appellant and returned promptly to OCP to allow the Department of Employment Services and the Office of Finance and Revenue to determine whether Appellant had complied with its tax obligations. (AF Ex. 1; Appellant's Ex. 4). This was part of the contracting officer's effort to determine Appellant's present responsibility. Appellant did not respond. On June 12, 2000, OCP again faxed the tax certification affidavit to Appellant, stating on the

fax cover page:

> SEVERAL ATTEMPTS [HAVE] BEEN MADE TO RECEIVE THE TAX CERTIFICATION AFFIDAVIT FROM YOU, BUT TO NO AVAIL. Your tax certification affidavit is required to be evaluated . . . to determine whether your company is in compliance or not. There is not enough time, the contract expires 7-10-00. Please fill out the tax certification upon receiving and return ASAP for the Moving and Services Contract . . . [n]o later than the close of business today.

(AF Ex. 1). Appellant returned the completed affidavit to OCP the same day.

On June 14, 2000, the contracting officer learned from the Department of Employment Services that Appellant was not in compliance with the District's tax filing and payment requirements. (AF Ex. 2). By letter of June 14, the contracting officer notified Appellant of its noncompliance with the tax requirements and directed Appellant "to take measures immediately by June 21, 2000 to correct the noncompliance issues cited in the DOES verification document that is enclosed." (AF Ex. 2). On June 29, 2000, OCP learned from the Office of Tax and Revenue that Appellant still was not in compliance with the tax filing and payment requirements of District tax laws. (AF Ex. 3). OCP faxed the noncompliance notice to Appellant the same day. (*Id.*). On June 30, 2000, the contracting officer informed the Appellant that it still did not comply with District tax laws. The contracting officer further warned Appellant that its contract would expire on July 10, 2000, if the Appellant failed to either correct the tax deficiency within 5 days or furnished an acceptable explanation for its failure to correct the tax deficiency. (AF Exs. 4, 6; Appellant's Ex. 2).

In a letter of July 5, 2000, Appellant explained that when it had filed its tax returns it was not able to pay the outstanding tax at that time. Appellant's vice president states in the letter:

> I have made several attempts to contact the Office of [Finance and Revenue] and Dept. of Employment Services to make arrangement for payment. I have left several messages and have yet to receive a return call. I am prepared to make payment today if I can reach someone. Please give me a chance to clear this matter.

(Appellant's Memorandum in Opposition, Ex. 1). In an affidavit, Appellant's vice president states that she paid the Office of Finance and Revenue all but $300 of its tax liability on July 5, 2000, with the remaining amount being paid on July 11, 2000. (*Id.*, Ex. 2). The vice president says further that she contacted personnel at the Department of Employment Services on July 5, 2000, but the officials who could finalize the compliance papers were on vacation. Appellant did not correct the tax deficiency and did not come into tax compliance until after July 10, 2000. (*Id.*, Ex. 2; Appellant's Statement of Controversy ¶ 5).

The District allowed the contract to expire on July 10, 2000. (*Id.*; Complaint ¶ 5).

The Appellant filed a claim with the contracting officer seeking $1,822,917.50 and exercise of the second year option. The contracting officer denied this claim and the Appellant appealed here,

arguing that the District should have exercised the second year option or entered into an equivalent contract with Appellant. The District has moved to dismiss for failure to state a claim or, in the alternative, for summary judgment.

DISCUSSION

We exercise jurisdiction over this appeal pursuant to D.C. Code § 2-309.03(a)(2).

To be entitled to summary judgment, the District must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Colbert v. Georgetown University*, 641 A.2d 469, 472 (D.C. 1994) (en banc); *Willis v. Cheek*, 387 A.2d 716, 719 (D.C. 1978). The record is viewed in the light most favorable to the party opposing summary judgment. *Colbert v. Georgetown University*, 641 A.2d at 472.

The key issue in this case is whether the District's contracting officer was legally obligated to exercise the second year option. Appellant argues that because the District employees who prepare tax compliance certifications were on vacation during the period from July 5-10, 2000, Appellant has demonstrated sufficient cause for its failure to correct its tax deficiency. Appellant concludes that the District improperly failed to exercise the second year option. The District argues that a contract option is a unilateral right that it may or may not exercise in its discretion. We conclude that the District had discretion in deciding whether to exercise the second year option and that it did not abuse its discretion by failing to exercise the option.

The pertinent portion of the contract states the following with regard to the option periods: "The District may extend the term of the contract for three (3) one (1) year option periods or any portion thereof by written notice to the Contractor before expiration of the contract." (AF Ex. 2, at 19). The phrase "may extend" indicates that exercise of the option is at the government's discretion. The District's procurement regulations define an option as "a unilateral right in a contract under which, for a specified time, the District may elect to purchase additional quantities or services called for by the contract, or may elect to extend the term of the contract." 27 DCMR § 2099.1. It is well-settled that for the type of option involved in the present contract the government has discretion in deciding whether to exercise the option, even when the government has provided the contractor preliminary notice of its intent to exercise the option. *Good Food Services, Inc.*, CAB No. P-0494, July 8, 1997, 44 D.C. Reg. 6846, 6847-48 (decision not to exercise an option contract is within an agency's discretion); *Government Systems Advisors, Inc. v. United States*, 847 F.2d 811, 813 (Fed. Cir. 1988).

The contracting officer did not abuse her discretion in declining to exercise the second year option. The undisputed facts show that the contracting officer repeatedly advised the Appellant to correct its tax deficiencies so that it could be found responsible. Despite the warnings, the Appellant did not timely correct its tax deficiencies. We can find no fault in the contracting officer's decision not to exercise an option when the contractor failed to demonstrate its present responsibility. Even viewing the record in a light most favorable to the Appellant, there is simply no basis for the assertion that the District was responsible for Appellant's delay in resolving its tax deficiency.

Finally, we reject Appellant's argument that the District had to exercise the option because Appellant provided an adequate explanation for failing to correct its tax deficiency. Even if we could conclude as a matter of law that Appellant provided an adequate explanation (the record does not support such a conclusion), its argument would still fail. Where all preconditions have been met for the government to exercise an option, the government still is not legally obligated to exercise the option. In *Government Systems Advisory, Inc. v. United States*, the contract provided that the government could extend performance only if appropriated funds were available. The contractor argued that the government had to exercise the option because appropriated funds were available. The Federal Circuit affirmed the trial court's ruling on summary judgment against the contractor, holding that such a contractual stipulation serves as a passive exculpatory provision available to the government, not one that obligates the government to exercise the option. 847 F.2d at 813. In the present case, when the District requested the contractor to comply with the responsibility conditions, the District did not thereby obligate itself to exercise the option if the contractor complied with those conditions.

CONCLUSION

Because we conclude, as a matter of law, that the contracting officer had no legal obligation to exercise the second year option, the District is entitled to prevail on summary judgment. The appeal is denied.

SO ORDERED.

DATED: July 25, 2002

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

MUSTANG DYNAMOMETER	)	
	)	CAB No. P-0655
Under Invitation No. 01-0121-AA-2-0-KA	)	

For the Protester: Mr. David Ganzhorn, *pro se*. For the Government: Howard Schwartz, Esq., Assistant Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Matthew S. Watson, concurring.

OPINION

CourtLink Filing ID 829610

Mustang Dynamometer, a subcontractor of Engineering Management Services, Inc. ("EMSI") who was the apparent low bidder in the Department of Public Works' procurement for renovation of the Northeast Vehicle Inspection Station, protests the contracting officer's determination that Mustang is not a responsible subcontractor. Because EMSI did not replace Mustang with another subcontractor, the contracting officer determined EMSI to be nonresponsible and awarded the contract to H.R. General Maintenance Corporation. The District has moved to dismiss the protest on the ground that Mustang, as a subcontractor, lacks standing to protest any award. Mustang has not responded to the motion. We agree with the District that Mustang lacks standing and therefore we dismiss the protest.

BACKGROUND

On August 2, 2001, the Department of Public Works ("DPW") issued IFB No. 01-0121-AA-2-0-KA for renovation of the Northeast Vehicle Inspection Station for the Department of Motor Vehicles. (District's Motion to Dismiss, Ex. 1). The renovation included installing five vehicle inspection lanes with completely installed and operating vehicle emissions inspection systems. (Ex. 1). On September 26, 2001, DPW opened bids from the following six bidders: EMSI, H.R. General, Keystone Plus Construction, Capitol Technology Services, Inc., Smoot Construction Company of Washington, D.C., and Maryland Construction, Inc. (Ex. 2). EMSI was the apparent low bidder with a bid of $5,936,000, of which $2,500,000 represented the amount for equipment. (Ex. 2) EMSI selected Mustang as its subcontractor to supply the testing equipment. (Motion to Dismiss, at 2). By letter to EMSI dated March 28, 2002, DPW rejected Mustang as a subcontractor due to its unsatisfactory record of past performance and advised EMSI that EMSI also would be found nonresponsible unless EMSI replaced Mustang with a responsible subcontractor. (Ex. 3; Motion, at 2). Because EMSI failed to submit a replacement subcontractor to DPW, the contracting officer approved a determination on April 17, 2002, finding EMSI nonresponsible on the basis that its subcontractor, Mustang, was nonresponsible. (Ex. 3). The determination provides in pertinent part:

> The portion of the contract to be performed by this subcontractor is a critical element of this project. This proposed subcontractor, Mustang Dynamometer, has recently performed work for the District and has established an unsatisfactory performance record. This history of poor performance covers an extended period of time and is well documented by the District Department of Motor Vehicles . . . .

(Ex. 3). On May 16, 2002, Mustang filed its 1-page protest challenging the award to H.R. General, claiming that the award was based on false and inaccurate statements, and that DPW erred in determining Mustang to be a nonresponsible subcontractor. EMSI, the prime contract bidder, has not protested the award and its being determined nonresponsible. Mustang has not responded to the District's motion to dismiss.

DISCUSSION

It is well-settled that a subcontractor, vendor, or supplier of a prime contract bidder does not have standing to protest a contract award. *MADVAC International, Inc.*, CAB No. P-0595, Nov. 18, 1999, 48 D.C. Reg. 1449, 1450; *Remco Business Systems, Inc.*, CAB No. P-0131, Dec. 30, 1988, 36 D.C. Reg. 4016, 4017. Because Mustang was not a bidder, but a subcontractor of one of the bidders, it does not have standing to challenge the award to H.R. General or the underlying nonresponsibility determination of itself or EMSI.

Accordingly, we dismiss Mustang's protest for lack of standing.

SO ORDERED.

DATED: July 30, 2002

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:

/s/ Lorilyn E. Simkins
LORILYN E. SIMKINS
Chief Administrative Judge

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

M.C. DEAN, INC.	)	
	)	CAB No. P-0654
Under IFB No. 01-0157-AA-2-0-KA	)	

For the Protester, M.C. Dean, Inc.: Fred A. Mendicino, Esq., Watt, Tieder, Hoffar & Fitzgerald, LLP. For Fort Myer Construction Corp.: Christopher M. Kerns, Esq. For the Government: Howard Schwartz, Esq., Assistant Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Matthew S. Watson, concurring.

OPINION

CourtLink Filing ID 829563

M.C. Dean, Inc., protests the award of a contract to Fort Myer Construction Co., alleging that Fort Myer failed to meet the solicitation requirement of having an electrical contractor's license, that the employee designated by Fort Myer in its bid as having the requisite certification for performing certain traffic signal work will not actually be performing that work, and that Fort Myer's bid is unrealistically low. The contracting officer determined that Fort Myer recently received the proper electrical contractor license, was a responsible contractor, and had the lowest responsive bid. Because M.C. Dean has not demonstrated any violation of law, regulation, or the terms of the solicitation, we deny the protest.

BACKGROUND

On March 15, 2002, the Department of Public Works ("DPW") issued IFB No. 01-0157-AA-2-0-KA for FY-02 City Wide Traffic Signal Bulb Replacement. (Agency Report ("AR"), Ex. 1). The IFB sought a contractor to furnish all necessary labor, materials, and equipment necessary to replace all incandescent vehicular and pedestrian signal heads with light emitting diode ("LED") modules at all signalized intersections and at all mid-block flashing signals or warning devices in the District. The proposed contract was for one year, with an option to extend the contract for an additional year.

Section A of the IFB required the prime contractor to be an electrical contractor licensed and bonded in the District. IFB section 19 states:

> A minimum of one of the contractor's employees must have demonstrated experience in the installation of traffic signal heads. This employee must be at least Level II IMSA Certified, and have experience working in and around the Type 170 microprocessor based solid state traffic signal controller. Proof of certification shall be a requirement for consideration as a responsive bidder. A copy of the employee's Level II IMSA certification shall be submitted with the contractor's bid. The contractor will be required

to retain an employee with these minimum credentials during the entire contract. This is the only contractor employee who will be permitted access to the controller cabinet.

(AR Ex. 1, at 11).

On April 17, 2002, DPW opened three bids. (AR Ex. 2). Fort Myer submitted the lowest priced bid in the amount of $7,888,551, and had attached to its bid the Level II IMSA certificate of Mr. Michael Holland. (AR Ex. 2, 3). M.C. Dean submitted the next lowest bid in the amount of $9,199,125, and attached the Level II IMSA certificate of Mr. Jerome Thomas. (AR Exs. 2, 4).

On May 1, 2002, M.C. Dean filed its protest with the Board. The District filed its Agency Report on May 22, 2002, noting that DPW was still evaluating the bids and had not made a determination concerning Fort Myer's responsibility. For those reasons, the District was unable to address the merits of M.C. Dean's protest grounds.

Fort Myer responded to the protest on May 31, 2002. Responding to M.C. Dean's responsibility challenge, Fort Myer states that it has been given final approval for its electrical contractor license. Addressing M.C. Dean's claim that the Fort Myer employee designated in its bid as the IMSA Level II certified technician will not actually perform the work, Fort Myer states that it will provide the appropriate Level II IMSA certified personnel for contract performance. Fort Myer argues that the solicitation does not mandate that only the specific employee named in its bid can perform the fieldwork under the contract. Addendum No. 2, issued April 2, 2002, contained answers to bidder questions raised at and after the pre-bid conference, including the following question tendered by M.C. Dean:

Question: Will you consider addressing the issue on whether or not the IMSA Level II person has to be a current employee upon submission of the bid, or a prospective employee upon award?

Answer: Yes. Page 11 and 12, Paragraph 3 of Special Provision 19 states that the employee's Level II IMSA certification shall be submitted with the contractors bid. The employee named on the certificate must be on the contractor's payroll when the sealed bid is submitted. This is to affirm the bid award is not compromised if employment of the certified employee is not executed.

(Protest, Ex. 2, Addendum No. 2, at 10-11). Fort Myer contends that this provision makes clear that it may have an employee other than the designated employee perform fieldwork so long as the employee is properly certified. Regarding M.C. Dean's argument that Fort Myer's bid is unrealistically low, Fort Myer states that it has confirmed that its bid is realistic and has shown the contracting officer how it calculated its bid prices. Although it concedes that its bid for pay item 9 (retrofitting signal head sections) is considerably lower than M.C. Dean's bid for the same pay item, Fort Myer points out that several other pay items in its bid were over twice as high as M.C. Dean's. (Fort Myer Response, at 6-7). Fort Myer also challenges the pricing estimates contained in the McIntosh affidavit (Protest, Ex. 4) submitted by M.C. Dean, arguing that the affiant failed to properly estimate the time required to replace a signal head section. (Fort Myer Response, at 5-6).

On June 10, 2002, the District filed the contracting officer's June 7, 2002 determination and findings which states that Fort Myer's bid was responsive and that Fort Myer was a responsible contractor. The District's determination and findings attached a copy of Fort Myer's electrical contractor license, dated May 29, 2002.

DISCUSSION

We exercise protest jurisdiction pursuant to D.C. Code § 2-309.03(a)(1).

The Procurement Practices Act and the procurement regulations require that the District award contracts only to responsible contractors. D.C. Code § 2-303.03(e); 27 DCMR § 2200. Generally, licensing is a matter of responsibility, not responsiveness. *Diversified Information Systems, Inc.*, CAB No. P-0454, Sept. 4, 1996, 44 D.C. Reg. 6495, 6496; *C&D Tree Service, Inc.*, CAB No. P-0440, Mar. 11, 1996, 44 D.C. Reg. 6426, 6434-6435. In the present case, the record contains a written determination by the contracting officer that Fort Myer is a responsible contractor and possesses the proper electrical contractor license required by the solicitation. We see no basis for disturbing the responsibility determination.

Regarding M.C. Dean's second protest ground, that Fort Myer did not intend to use the Level II IMSA certified employee designated in its bid for contract performance, we agree with Fort Myer that the contract terms do not require it to use only that designated employee for work involving the traffic signal controller. What the contract requires is that the contractor retain an employee with the Level II IMSA credentials during the entire term of the contract and that at least one employee who is Level II IMSA certified be present whenever access is required to a traffic signal controller cabinet. (AR Ex. 1).

Finally, M.C. Dean claims that Fort Myer's bid price is unrealistically low. The record does not show that Fort Myer's bid is below the cost of performance. Even if the evidence supported such a finding, we have held that a bid price below the cost of performance is not objectionable for that reason alone. *C.P.F. Corp.*, CAB No. P-0521, Jan. 12, 1998, 45 D.C. Reg. 8697, 8700. Whether the contract can be performed at a price below the cost of performance is a matter of bidder responsibility. We are satisfied from the record that the contracting officer has considered bid pricing when it determined Fort Myer to be responsible.

CONCLUSION

We have carefully considered each of M.C. Dean's protest arguments. Having concluded that M.C. Dean has not shown that the District violated law, regulation, or the terms of the solicitation in evaluating Fort Myer's responsibility and selecting it for award, we deny M.C. Dean's protest.

SO ORDERED.

DATED: July 30, 2002

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

UNFOLDMENT, INC	)	
	)	CAB No. D-1062
Under Contract7KGC09	)	

For the Appellant, Unfoldment, Inc.: Brian Lederer, Esq. For the District: Andrew J. Saindon and Jennifer L. Longmeyer, Assistants Corporation Counsel, DC.

Order by Chief Administrative Judge Lorilyn Simkins with Administrative Judge Matthew S. Watson, concurring.

ORDER ON MOTION FOR RECONSIDERATION

Appellant has timely moved for reconsideration of the Board's Order, dated March 20, 2002, which dismissed or denied all of Unfoldment's claims, except for unpaid invoices, Quick Payment Act and simple interest. Unfoldment asserts that because of "new evidence not previously available to this Board" that the Board should reconsider its decision that the contract was not a multi-year contract. Appellant also asks for reconsideration of the Board's decision to permit a settlement letter written by the Contracting Officer Milton Grady to be used as evidence of Unfoldment's entitlement to certain closing and initial costs. Finally, the appellant requests reconsideration of the Board's dismissal of Unfoldment's allegations of bad faith by CFSA.

The Board Rule 117.1 (49 D.C. Reg. 2094-2095 (Mar. 8, 2002)) provides:

A party to an appeal or a protest may by motion request the Board to reconsider its decision or order for the reasons stated below:

(1) to clarify the decision;
(b) to present newly discovered evidence which by due diligence could not have been presented to the Board prior to the rendering of its decision;
(2) if the decision contains typographical, numerical, technical or other clear errors that are evident on their face;
(d) if the decision contains errors of fact or law, except that parties shall not present arguments substantially identical to those already considered and rejected by the Board.

Contrary to Appellant's assertion that the RFP is "new evidence" which the Board should consider, the legal standard associated with newly discovered evidence requires that by due diligence the evidence could not have been presented to the Board prior to the rendering of its decision. Board Rule 117.1(b). In making its argument for reconsideration, Unfoldment has failed to demonstrate that the RFP could not have by due diligence been presented prior to the rendering of the Board's decision. *See American Continental Ins. Co. v. Pooya*, 666 A.2d 1193 (D.C. 1995). It is clear that

the RFP has been available to appellant since it bid on the contract in 1997. Appellant may not use a motion for reconsideration to furnish information that was available to it but not submitted, at the time of the original decision.

Unfoldment also argues that the government had the burden of furnishing the RFP to the Board via the Appeal File. Appellant is correct that the government is required to assemble and transmit to the Board an appeal file consisting of all documents pertinent to the appeal. Board Rule 203.1, 49 D.C. Reg. 2101. However, an appellant is also required, after receipt of the appeal file, to transmit to the Board any documents which it considers relevant to the appeal. Board Rule 203.3, 49 D.C. Reg. 2101. Further, the Board may require either party to supplement the appeal file. Board Rule 203.4. During a telephone conference on October 11, 2001, both parties agreed and the Board orally ordered that the government file the Appeal File by November 1, 2001, and that the appellant by November 15, 2001 file any documents that it considered to be relevant to its appeal. Appellant had ample opportunity to file the RFP with the Board, but failed to do so. Appellant cannot now claim that it had no responsibility to submit the RFP to the Board or that the decision on the nature of the contract should be reopened because the government did not supply the RFP for the record. We therefore deny appellant's request for reconsideration of its claim that this was a multi-year contract.

Appellant also requests the Board to reconsider its ruling that Mr. Grady's settlement letter could not be used as evidence to prove that Unfoldment's contract was terminated for cause or convenience. Appellant's argument is not based on any newly discovered evidence or substantially different legal theory than it presented before. The Board's decision was based on *Pyne v. Jamaica Nutrition Holding Ltd., 497* A.2d 1118, (D.C. 1985), a Court of Appeals decision holding that offers of compromise or settlement agreements may not be used to prove liability for a claim or its amount. There is no basis for appellant's request for reconsideration, and it is therefore denied.

Finally, Appellant fails to raise any new argument regarding bad faith. The Board dismissed Appellant's unsupported allegations of bad faith because appellant's arguments were irrelevant in light of the fact that Appellant had failed to make an evidentiary showing, via affidavit or otherwise to demonstrate that CFSA had a specific intent to injure the appellant or that CFSA's actions were motivated by malice. *See District of Columbia v. Organization for Environmental Growth, Inc.*, 700 A. 2d 185, 199-201 (D.C. 1997). Accordingly, we deny appellant's request for reconsideration.

SO ORDERED.

DATE: July 30, 2002

LORILYN E. SIMKINS
Chief Administrative Judge

MATTHEW S. WATSON
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:	)	
	)	
DIXON'S TERMITE AND PEST CONTROL, INC.	)	CAB No. P-0659
	)	
Under RFQ No. 2048	)	
WATER AND SEWER AUTHORITY	)	

For the Protester: Dixon's Termite and Pest Control, Inc., Bob Dixon President, *pro se.* For the Government: Nicole C. Mason, Esq., Leftwich and Douglas, P.L.L.C.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Lorilyn E. Simkins, concurring.

OPINION

(Courtlink Filing ID 848171)

The District of Columbia Water and Sewer Authority ("WASA") filed a Motion to Dismiss the instant protest on the grounds that the protester had failed to exhaust administrative remedies prior to appealing to the Board[1], or, in the alternative, that the Board lacks jurisdiction to consider protests against WASA contract awards. The Board finds that it is without jurisdiction over WASA procurements and dismisses the protest.

BACKGROUND

On April 12, 2002, WASA issued Request for Quotations ("RFQ") No. 2048 for pest control services at WASA locations for the five-month period from May 1, 2002 through September 30, 2002. (Motion, *Courtlink Filing ID 828163*, Ex. A). The RFQ was a best value, small purchase procurement. Four quotations were received by the due date of April 29, 2002. Award was made to the firm determined to be the best value offeror on June 6, 2002. *Id.* On June 28, 2002, Dixon's Termite and Pest Control, Inc. filed the instant protest alleging that it had not been informed of the award.

DISCUSSION

This Board is an administrative agency created by the Procurement Practices Act of 1985 ("PPA") which is codified as Chapter 3 of Title 2 of the D.C. Code (2001 ed.), (§§2-301.01 to 2-327.03), and particularly, Subchapter IX (*id.* at §§2-309.01 to 2-309.08). Jurisdiction of the

[1] If, as argued by WASA, the Board lacks jurisdiction over protests of WASA contracts, it is not apparent how the Board could consider the issue of whether the protestor had exhausted administrative remedies. In light of the Board's determination that the Board does, in fact, lack jurisdiction, the issue of exhaustion of remedies has not been considered

Board shall be consistent with the coverage of . . . [the PPA] and [the exceptions provided in] §2-303.20. . . ." D.C. Code §2-309.03(b). and the Board shall have only those powers conferred on it by statute, either expressly or by necessary implication. *See e.g., Black Entertainment Television*, CAB No. P-436, Oct. 2, 1995, 44 D.C. Reg. 6394; *Xerox Corp.*, CAB No. D-979, Nov. 6, 1995, 44 D.C. Reg. 6406.

Section 3-303.20(j) of the codified PPA provides:

> Nothing in this chapter [, the Procurement Practices Act,] shall affect the District of Columbia Water and Sewer Authority's powers to establish and operate its procurement system and to execute contracts pursuant to Chapter 22 of Title 34. 10.[2]

In the absence of the applicability of our organic statute to WASA procurements, the Board lacks jurisdiction to consider a protest against a contract award by WASA. Appellee's Motion to Dismiss is GRANTED and the protest is DISMISSED for lack of jurisdiction.

SO ORDERED

August 7, 2002

MATTHEW S. WATSON
Administrative Judge

CONCURRING:

LORILYN E. SIMKINS
Chief Administrative Judge

[2] Similarly D.C. Code §34-2202.14 provides that the Procurement Practices Act. D.C. Code, "§ 2-301.01 *et seq.*, shall not apply to the [Water and Sewer] Authority."

NOTE[3]

Although the Board finds that it does not have jurisdiction to consider protests against award of WASA contracts, it notes that the absence of any administrative protest mechanism outside of the Authority creates the appearance of lack of independence in considering protests by prospective WASA contractors and does not enhance the perception of integrity in the procurement system. The WASA procurement regulations provide only for a protest to WASA's Contracting Officer (21 DCMR §5330.12), and, if the protester is not satisfied with the relief obtained, an appeal of the Contracting Officer's decision to the WASA General Manager. (21 DCMR §5330.15). This is not in keeping with the best practices both in the Federal Government, where administrative protests may be made to the independent General Accounting Office, or in general in the District government, where protests may be made to the Board. In addition, award of contracts, or performance of awarded contracts will generally be stayed in protest to the GAO and the Board, *see* D.C. Code §3-309.08(c)(2), which is not the case pursuant to the WASA procedures. 21 DCMR §5330.10.

In addition, the Board is also concerned that WASA's procedures for bid protests do not meet the best practices in the Federal and District governments and further, in particular cases, may not meet basic due process standards. For example, "[b]id protests directed to the terms, conditions or form of a proposed procurement action must be received . . . not later than ten (10) working days before the date established for opening of bids and proposals. . . ." *Id.* at §5330.4. "A person protesting an award decision is required to file the protest with the Contracting Officer within five (5) working days if when the protester knew or should have known of the facts and circumstances upon which the protest is based." *Id.* at §5330.3. In general, in both the District and Federal governments protest regarding the solicitation may be filed up to the time of opening, *see* D.C. Code §2.309.08(b)(1), and protests against award decisions may be filed within 10 working days of knowledge. *See Id.* at (2).

Based on the record submitted to the Board in this matter, there may be question as to whether the solicitation was properly solicited under "small purchase" procedures. WASA small purchases are limited to contracts not exceeding $100,000. 21 DCMR §5304.2. "Procurement requirements shall not be artificially divided to circumvent . . . procedures made applicable to procurements of greater value. (*Id.* at .4). The award price in the instant matter was $40,000 (Motion, Ex. C) which appears to be far below the maximum small purchase limitation. However, since the award was for only 5 months service, the price is on an annualized basis is $96,000, quite close to the small purchase limit. WASA's regulations made it impossible, as a practical matter, for any prospective contractor to raise this issue in this procurement.

As noted in our decision, the RFQ was issued on Friday, April 12, 2002, with a response date of Monday, April 29, 2002. Since a protest concerning the propriety of using the small purchase procedures must, pursuant to WASA's regulations, be filed 10 business days prior to

[3] The Contract Appeals Board has a unique opportunity to review procurements arising from the entire range of District of Columbia Government activity. Where we see problem areas in procurement practices which might be considered by other agencies we will report on these practices as Notes appended to protest and appeal decisions. These Notes are for information only and are not binding on agencies or to be considered precedent of any sort.

the RFQ response date, such a protest, to be timely, would have had to have been filed no later than Monday, April 15, 2002. If the RFQs were mailed on Aptil 12th, April 15th would have been the day the requests were received. Even if the RFQs were faxed or hand-delivered, and delivery occurred the same day as the RFQ was issued, there would have been only one business day following receipt to file a protest. A requirement to protest immediately upon receipt of a solicitation is clearly unreasonable. A prospective contractor which was not solicited by WASA, but which learned of the solicitation in some other way, could not even theoretically have filed a timely protest.

Although WASA is exempt from coverage of the PPA, and from the mandatory jurisdiction of the Board, District of Columbia agencies, such as WASA, not covered by the PPA may enter into agreements with the Board permitting the Board to hear and decide procurement disputes. D.C. Code §2-309.03(b). Adoption by WASA of dispute resolution procedures comparable to the generally accepted Federal and District procedures and the submission of disputes to an independent third-party, such as the Board, would, in our opinion, improve the confidence of contractors and the public in the WASA procurement system.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

HOOD'S INSTITUTIONAL FOODS, INC.	)	
	)	CAB No. P-0658
Under Solicitation No. POHA-2002-B-0629	)	

For the Protester, Hood's Institutional Foods, Inc.: Philip L. Kellogg, Esq., Kellogg, Williams & Lyons. For the Government: Howard Schwartz, Esq., Assistant Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Administrative Judge Matthew S. Watson, concurring.

OPINION

CourtLink Filing ID 878031

Hood's Institutional Foods, Inc., protests the award of a summer food service contract to Preferred Meal Systems, Inc., and the contracting officer's determination that Hood's bid was nonresponsive for Hood's failure to submit a performance bond. Hood alleges that it never received the proper notice for the performance bond as required by the solicitation. We conclude that Hood received adequate notice but failed to submit the performance bond. Accordingly, we deny the protest.

BACKGROUND

On June 16, 2002, the Office of Contracting and Procurement ("OCP") issued an emergency solicitation, RFQ No. POHA-2002-B-0629, on behalf of the Department of Parks and Recreation, for a food service management company to prepare and deliver boxed breakfast and lunch meals to 49 Parks and Recreation Centers and Boys and Girls Clubs from June 24, 2002, through August 30, 2002. (Agency Report, *CourtLink Filing ID 805642* ("AR") at 3; Determination and Findings, *CourtLink Filing ID 775021* ("D&F"), filed June 28, 2002, Ex. B). The summer food service program is funded by the United States Department of Agriculture ("USDA"). The following prospective bidders received the RFQ: Hood's Institutional Foods, J&K Distributors of Washington, D.C., Food Resource Management, Martin's Inc., THL Associates, Preferred Meal Systems, Inc., and Georgia Food Service Inc. The RFQ required the successful contractor to prepare and deliver 4,275 breakfast meals and 5,225 lunch meals each weekday of the performance period. Section C.1.1 of the statement of work makes applicable to the contract the USDA Summer Food Service Program regulations found at 7 CFR Part 225. Section C.3.7 provides:

> The successful Contractor shall provide to [the Department of Parks and Recreation] a performance bond and payment bond within 24 hours following notification that the Contractor is the lowest responsive and responsible bidder. The performance bond shall be 100% of the bid price and the payment bond shall be 50% of the bid price.

On June 11, 2002, OCP issued Amendment No. 1 to the RFQ, which extended the bid opening from June 16 to June 17 and provided the following bidder question and OCP answer:

> Question: Is a bid bond required?
>
> Answer: A bid bond is not required. Only a performance bond and payment bond is required as indicated in paragraph C.3.7 on page 3 of the Scope of Work.

(D&F Ex. C).

On June 17, 2002, OCP opened three bids: Hood's in the amount of $709,887, Preferred Meal Systems in the amount of $757,601, and Georgia Food Service in the amount of $765,514. (AR Exs. 4, 6; D&F Ex. D). Because Hood had the apparent low bid, OCP's contract specialist contacted Mr. Hood by telephone shortly after bid opening and advised him that Hood was the apparent low bidder and that a letter would be faxed to him within an hour which would request that Hood submit responsibility data, including the performance bond, by noon on June 19, 2002. (D&F at 1-2; D&F Ex. E). The contracting officer did fax a letter to Hood that day, which stated that a "prospective contractor must affirmatively demonstrate responsibility" and that the contracting officer "must make a determination of nonresponsibility if the information obtained does not indicate clearly that the prospective contractor is responsible." (D&F Ex. E, at 1). In the letter, the contracting officer additionally states:

> In order for the contracting officer to make a decision, in accordance with the above [responsibility] regulation [27 DCMR § 2200], please respond to the following checked requests:
>
> . . . .
>
> 8. Please provide a performance bond of 100% of the bid price and a payment bond of 50% of the bid price.
>
> Please complete and return the information by 12:00 Noon, Wednesday, June 19, 2002.

(D&F Ex. E).

In a telephone call to the contracting officer at some point during the morning of June 19, 2002, Mr. Hood requested that Hood be given an extension of time to submit the responsibility data. The contracting officer extended the deadline from noon to 1 p.m. on June 19. Hood's response was delivered at 1:15 p.m. (D&F at 2; D&F Ex. F). Hood's responsibility data submission was incomplete. Hood failed to produce a list of current contracts relating to the RFQ, a list of qualified personnel, a copy of the truck leases, and the performance and payment bonds. In addition, Hood stated that it intended "to accomplish the mission and meet the requirements in accordance with the contract by relying on [Georgia] Food Services to provide most of the supplies for the contract." (D&F Ex. F). In its June 19 submission, Hood also furnished a letter of the same date from Inner Harbour Insurance Inc., addressed to Hood, advising Hood that Inner Harbour was in the process of evaluating Hood's request for a performance bond, and requesting certain additional information from Hood. (D&F Ex. F).

At 9 a.m. on Thursday, June 20, the contracting officer called Mr. Hood, advising him that he would receive a letter, by fax and email immediately after their conversation, requiring Hood to furnish the missing responsibility data, by no later than 12 noon that day. Hood requested that the contracting officer waive the performance bond requirement. The contracting officer replied that the USDA mandated the bonding requirement and that OCP had to have the performance bond prior to awarding the contract, and the deadline was important because contract performance was to begin Monday, June 24, at 8 a.m. Mr. Hood told the contracting officer that he would have no problem acquiring the performance bond and that OCP would receive it when Hood submitted its response to the missing data by 12 noon that day. (D&F at 3). After the telephone conversation, the contracting officer issued Amendment No. 2 to the RFQ reducing the amount of the performance bond from 100 to 25 percent of the bid price. (D&F Ex. H). Hood confirmed receipt of this amendment. (D&F at 3). The contracting officer issued the written request for the missing responsibility data with the deadline changed from 12 to 4 p.m. that day. (AR Ex. 1).

Later the same day, the contracting officer made a request to the USDA for waiver of the performance bond requirement but that request was denied by the USDA in the afternoon. (D&F Ex. I). Hood submitted the missing responsibility data to OCP later in the afternoon of June 20, but its submission did not contain the required performance bond. In his cover letter, Mr. Hood stated: "Bonding Company is currently processing the application." (AR Ex. 2).

During the morning of Friday, June 21, the contracting officer requested for a third time that Hood provide the required performance bond, with a deadline of 12 noon, and if the bond was not timely received, OCP would award the contract to the next low bidder. Hood failed to provide a performance bond. (D&F at 3).

The contracting officer determined Hood to be nonresponsible for failing to provide the performance bond. (D&F at 3). Preferred Meal Services provided the required performance bond and was awarded the contract in the afternoon of June 21. (AR Exs. 4-6). It began performance on Monday, June 24, at 8 a.m. (D&F at 3).

By letter dated June 24, 2002, the contracting officer advised Hood that the USDA had denied the request for waiver of the performance bond, that Hood's bid was deemed "nonresponsive" (the contracting officer probably intended to say that Hood was determined to be "nonresponsible") due to Hood's failure to provide a performance bond within 24 hours of notification that Hood was the apparent low bidder, and that OCP had awarded to Preferred Meal Services the contract for summer food service. (AR Ex. 3).

On June 25, 2002, Hood filed its protest with the Board, contending that the District improperly found Hood nonresponsible.

DISCUSSION

We exercise protest jurisdiction pursuant to D.C. Code § 2-309.03(a)(1) (2001).

Hood argues that the District failed to give proper notice for the performance bond. Section C.3.7 of the solicitation states that the contractor shall provide the performance bond within 24 hours "following notification that the Contractor is the lowest responsive and responsible bidder." Although there is no dispute that the contracting officer notified Hood on June 17 to submit the performance bond by June 19, Hood contends that the June 17 notice was merely notice that is was the apparent low bidder, not that it was the low responsive and responsible bidder as section C.3.7 requires.

The District responds that the contracting officer constructively amended the RFQ by requiring submission of the performance and payment bonds prior to contract award and thus making the bond submission requirement a part of the responsibility evaluation.

We agree with the District under the facts present here that the contracting officer clearly communicated that the performance bond was required as part of the responsibility evaluation, and that Hood understood the requirement and agreed to fulfill it. The contracting officer twice extended the deadline under this emergency procurement to accommodate Hood. The contracting officer also sought a USDA waiver of the performance bond requirement although the USDA denied the request. Hood's failure to submit the performance bond under the circumstances was unreasonable. Accordingly, we sustain the contracting officer's determination that Hood was not responsible for its failure to furnish the bond.

The District also argues that Hood's bid was nonresponsive because Hood intended to have a subcontractor who was responsible for production of the meals. *See* 7 C.F.R. § 225.6(b)(2)(iii). The record is not adequate to support finding Hood's bid nonresponsive on that basis.

CONCLUSION

Having sustained the contracting officer's determination that Hood was nonresponsible for failing to submit a performance bond, we deny Hood's protest.

SO ORDERED.

DATED: August 23, 2002

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

INTERNATIONAL BUILDERS, INC.	)	
	)	CAB No. P-0661
Under Solicitation No. POAM 2002-B-0019-DR	)	

For the Protester: Fernando J. Villegas, President. For the Government: Howard Schwartz, Esq. and Warren J. Nash, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson with Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

(Courtlink Filing ID: 979154)

International Builders, Inc. ("International" or "Protester") protests the award of any contract under the subject solicitation. Protester asserts that at a pre-bid conference two weeks before bid opening the contract administrator instructed bidders, contrary to the terms of the solicitation, to include the cost of engineering and architectural design in their bids and further indicated that a modification of the solicitation incorporating this instruction would be issued. Although no modification was issued, Protester asserts that it and other bidders which attended the pre-bid conference based their bids on the contract administrator's verbal instructions, while other bidders who were not present at the pre-bid conference based their bids on the unmodified wording of the solicitation, giving unfair advantage to bidders who did not attend the pre-bid conference. We find that the protest is untimely. We therefore dismiss the protest.

BACKGROUND

The subject solicitation for construction services was issued July 25, 2002, scheduled for opening August 29, 2002. On August 15th, the District held a pre-bid conference at which time the contract administrator advised the potential bidders attending the conference that, although not included in the solicitation, "engineering and architectural design would be a part of [the] contract requirement."[1] (Letter of Protest). No modification of the solicitation was issued to conform to the verbal instruction given at the pre-bid conference. (*Id.*)

Sixteen bids were opened on August 29, 2002. (Motion to Dismiss, Ex. 2). By letter dated August 30, 2002 and received by the Board September 6, 2002, International protested against any award pursuant to the solicitation. The protest alleges that bidders

[1] For purposes of determining timeliness, the Board has assumed that all of the allegations of the Protester are true.

which did not attend the pre-bid conference were given an unfair advantage because their bids were made in accordance with the terms of the written solicitation, while International and other bidders who attended the pre-bid conference computed their bids to include the additional requirements orally stated by the contract administrator. (*Id.*).

DECISION

Timeliness of protests is governed by D.C. Code §2-309.08 (2001 ed.) which states:

> A protest based upon alleged improprieties in a solicitation prior to bid opening . . . shall be filed prior to bid opening . . . .

Protester became aware of the discrepancy between the written terms of the solicitation and the additional requirements orally stated by the contract administrator no later than August 15, 2002, the date of the pre-bid conference. Notwithstanding that Protester was lulled into inaction by the statements of the contract administrator that a modification of the solicitation would be issued, the time for filing protests concerning the terms of solicitations is set by statute to be *prior to bid opening*. (*Id.*).

Bids were opened on August 29, 2002. The instant protest was received by the Board on September 6, 2002. As this protest concerns specifications contained in the solicitation, the protest is untimely. The protest is therefore dismissed.

SO ORDERED.

DATED: October 11, 2002

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

CONCURRING:

/s/ *Jonathan D. Zischkau*
JONATHAN D. ZISCHKAU
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

HORIZONS THERAPEUTIC SERVICES, INC.)
) CAB No. P-0663
Under Invitation No. GAGA-2003-B-001)

For the Protester: Mr. Shawn King, Vice President, Horizons Therapeutic Services, Inc., *pro se*. For the District of Columbia Government: James A. Baxley, Esq., Deputy General Counsel, District of Columbia Public Schools.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Matthew S. Watson, concurring.

OPINION

CourtLink Filing ID 1081036

Horizons Therapeutic Services, Inc. ("HTS") protested the District of Columbia Public Schools' award of a contract for drug and alcohol screening, physical examination, and medical evaluation services for employees of the District of Columbia Public Schools ("DCPS"). HTS alleges that the contracting officer "did not call a bid opening nor announce the date and time of the bid opening, even though HTS's representative was there to witness the bid opening . . . ." HTS further states that it was the only responsive and responsible bidder. DCPS has moved to dismiss the protest on the ground that HTS's bid was submitted late and that its protest is also untimely. HTS has not responded to the motion or rebutted the District's statement of facts. Accordingly, based on the uncontested motion of the District, the protest is dismissed.

BACKGROUND

On August 27, 2002, the DCPS Office of Contracts and Acquistions issued IFB No. GAGA-2003-B-001 for drug and alcohol screening, physical examination, and medical evaluation services for DCPS employees. (DCPS's Dispositive Motion in Lieu of Agency Report, filed Octobert 29, 2002, Ex. A). The solicitation provided that bids would be accepted until 2:00 p.m. on September 25, 2002. (Id., Ex. A). The solicitation was also posted on the DCPS website and advertised in the Washington Times. (Id., Ex. B). The Washington Times advertisement indicated that bids were due by 2:00 p.m. on September 25, 2002, as stated in the solicitation. DCPS states that HTS failed to submit a bid by the due date and time and that no representative was present at the time of bid opening. HTS states that it received verbal notice of award of the contract to another bidder on October 2, 2002. HTS filed its protest on October 9, 2002. Beyond claiming that the contracting officer "did not call a bid opening nor announce the date and time of the bid opening, even though HTS's representative was there to witness the bid opening," HTS states in its protest that it would demonstrate "in forthcoming correspondence" that the selection and award were flawed. HTS filed no additional documentation

with the Board and has not responded to the District's motion, despite repeated requests from the Board.

DISCUSSION

When a protester fails to respond to a dispositive motion and fails to contradict the factual allegations in the agency's dispositive motion, the Board may treat the motion as conceded and dismiss the protest. Board Rules 307.3 and 307.4. Because HTS has failed to respond to DCPS's dispositive motion, we treat the motion as conceded and dismiss the protest.

SO ORDERED.

DATED: November 29, 2002

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge